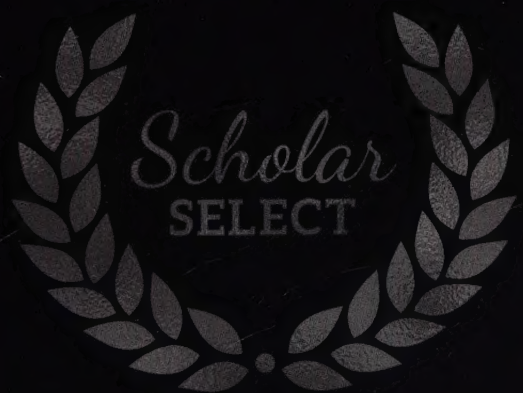
Moral Overstrain



GEORGE WILLIAM ALGER

Moral Overstrain

MORAL OVERSTRAIN

BY

GEORGE W. ALGER

BOSTON AND NEW YORK
HOUGHTON, MIFFLIN AND COMPANY
The Riverside Press, Cambridge
1906

Bright funs

Published April 1906

CONTENTS

I

MORAL OVERSTRAIN

MORAL OVERSTRAIN

In mechanics it is part of the engineer's profession to consider carefully the amount of physical weight and pressure which various substances will bear, — how many pounds a given girder will sustain; how much an upright. It is upon this science and its carefully figured mathematical details that the safety and well-being of the housed community so largely depend. Sometimes, to be sure, even the most carefully estimated plans are spoiled by some unforeseen and unforeseeable weakness in the structural material, and it gives way at a pressure or strain apparently none too great for its endurance. But these occasional obsessions of inanimate nature do not discourage the engineer, or make him abandon his interminable mathematics. In

spite of them, or rather on account of them, he continues his studies so that he may better succeed in placing on the materials which he uses no grievous burden, and may not subject them to a stress or strain forbidden by natural law. Collapses of buildings are less frequent, and community life becomes safer, as this expert knowledge, founded on study and experience, grows broader and surer.

It is rather a sad thing, when one thinks of it, that the field of this sort of mathematics has such definite limitations, and that we cannot by mathematical formulæ calculate moral stress and strain, and ascertain how far we can safely go in placing burdens on the characters of those with whom we do business, or of those with whom we have social intercourse. Consider, for example, the great court calendars in the large cities. How many thousands of those cases, formal announcements of men at war with one another, or of

society itself at war with the individual, are really nothing more nor less than examples of the unfortunate results of moral overstrain. One man has placed too great a burden on the moral strength of another, and there has been a break or a total collapse. And when that collapse comes, note the difference in the procedure which follows. When the building wall cracks, or at the first observable indication of insecurity of foundation, the builder's first thought is to preserve the building, to relieve the strain on the weak spot, to strengthen its supports, and to reinforce its foundation. There has been no corresponding practice yet devised which may be followed when the moral crash comes and a business man's character goes to pieces, or when a thief or murderer is brought to the bar of criminal justice. There is no "jacking-up" process for overstrained morals to be found in the law courts.

We take philosophically enough the

daily moral breakdown of our fellow men, and ordinarily do not complain to Providence against our inability to ascertain with mathematical certainty the extent of the confidence we can safely repose in the people with whom we have intercourse. It has always been so and always will be. We cannot apply mathematics to human conduct. The fidelity insurance corporations which have sprung up within recent years have, to be sure, their systems based on experience for estimating moral hazards; and they have curious and exceedingly interesting theories of moral probabilities by which, for example, they estimate the chances of defalcation by an employee in a given employment in which given opportunities for wrong-doing are not counterbalanced by certain systems of inspection or supervision. These corporations and a few large financial institutions apparently recognize the necessity of considering moral risks somewhat in the way in

which the engineer estimates upon the girder, how he can make it perform its useful functions in a house without being broken down by overstrain and bringing calamity with its fall. The policy of the financial institutions in dealing with this question deserves a study by itself. Their method involves, generally, in its application to subordinate employees, a complex and carefully studied business system filled with "checks and balances," with frequent inspections and examinations, which are intended to reduce the opportunity for successful wrong-doing to a minimum. The pay of the minor employees of a banking house who handle fortunes daily is, as a rule, pitifully small, showing a conscious purpose in these institutions of relying principally upon a practical certainty of detection, coupled with a remorseless and relentless severity in prosecution and punishment, as a relief for the severe moral strain upon employees whose

opportunities and temptations for wrong-doing are, from the nature of the employment, large.

Except in these financial institutions and these fidelity insurance corporations, there seems to be in practical operation no rational system for estimating or relieving the strain upon morals which business life necessarily involves. Outside of this narrow group, the only theory which seems current is one based upon a generality, the fallacy in which receives almost daily demonstration, and yet one which is firmly fixed in the public mind. It is a theory which is as far as possible the absolute opposite of that upon which the engineer deals with the question of strain and stress in mechanics. This theory, curiously enough, has a quasi-religious origin. It is based upon that duty of faith concerning which we hear so much in this generation. We are realizing now, as no previous generation has realized, the importance and

power of the element of faith, both to our happiness and to our capacity for usefulness. The word itself is a noble one, and has the greatest importance, not solely in its connection with the unrevealed part of religion, but with our daily work in business as well. It is certain that we must have faith in our fellow men. It is undoubtedly true that one of the worst misfortunes, as well as one of the most singular marks of weakness and incapacity in either man or woman, is the absence of faith and the habit of suspicion. As Lord Bacon well said, "Suspicions amongst thoughts are like bats among birds. They ever fly by twilight. Certainly they are to be repressed, or at least well guarded, for they cloud the mind, they lose friends, and they check with business, whereby business cannot go on currently and constantly."

It is undoubtedly true that faith itself is something essential to the happiness

of mankind, whether one considers it as indicating faith in God, or in man, or in both. Our great men, both in public and in private life, have been men who had trust and faith in their fellows. It cannot be too often repeated that this quality of faith is one of the strongest and finest of those vital priciples which are essential to the highest type of character. But, as La Rochefoucauld says, "the truth has not done so much good in the world as the appearance of truth has done evil." The trouble with this constant iteration in these days of the necessity for us to have faith in our fellows is that it fails to note the necessary and logical limitations of the doctrine. The engineer or builder may have faith in a span or girder he uses, but he does not for that reason allow an unlimited pressure to fall upon it. On the other hand, the rule of faith which is commonly preached to us from the pulpit is generally based upon the assumption that faith itself has the

unique quality or power of *creating* strength where it puts pressure, and that the rules of natural or physical law cannot be applied in this regard to the unseen structural materials of the spiritual world. How many times, for example, have we all heard, in one form or another, the pathetic anecdote of the malefactor turned from his projected crime by some one trusting him, or of the criminal placed with a full opportunity of crime immediately before him, with escape practically certain, who has been deterred from his evil purpose simply by the moral force which the trust and confidence of another have created in him.

This illustration of the power of faith is one used most frequently by persons whose understanding of spiritual matters and things of God far overbalances their judgment and their practical insight into human character. It is a very beautiful story when well told, and we all have a sentimental side to our natures to which

it appeals. But while these occasional cases may and undoubtedly do exist, to base a theory of conduct on them is hardly less foolish than for the reader of sentimental novels to assume that in the world of men truth crushed to earth always rises uninjured, and that virtue always triumphs in the last chapter.

A doctrine, the precise opposite to this rule of faith, I heard as it was laid down impressively some years ago by a great criminal jurist. His long daily experience on the bench with human weakness, while it had enlarged his great natural insight into character and motive, had neither soured him nor made him cynical. He, certainly, could speak on the subject of moral strain with the voice of authority. It was in the old court of Oyer and Terminer in New York, and Recorder Smyth had just passed sentence on a young man who had been convicted of robbery in snatching a watch from a lady in the shopping district of Sixth

Avenue. It was in the fall of 1892, when times were hard, and the streets and park benches were filled with gaunt, hungry-faced creatures, out of work and full of misery. The lady had been shopping all day long in streets thronged with these people, wearing a small jeweled watch attached to her dress by a chatelaine. This young man, who was scarcely more than a boy, had seen the watch, and, snatching it, had attempted to escape in the crowd, when he was caught. After the Recorder had passed sentence, sending this young fellow to penal servitude, he turned and addressed a few remarks to the prosecutrix, who stood near the bar, weeping sympathetically, and mopping up her copious tears with her handkerchief. The tears were even more copious, though from a different emotion, when the judge had finished. "Madam," he said, "it is one of the great defects of the criminal law that it has no adequate punishment for those who incite

their fellows to crime. If it were in my power to do so, I can assure you I should feel it a pleasanter duty to impose an even severer sentence than the one I have just rendered, on the vain woman who parades up and down the crowded streets of this city, filled as they are to-day with hungry people, wearing ostentatiously on her dress, insecurely fastened, a glittering gewgaw like this, tempting a thousand hungry men to wrong-doing. There are, in my judgment, two criminals involved in this matter, and I sincerely regret that the law permits me to punish only one of them."

These rather caustic remarks of the old Recorder have a much broader scope than merely an application to the women who love to display costly finery. How many thousands of business men there are who manage their affairs in slipshod, slovenly fashion, and who complain bitterly of the abuse of the "perfect confidence" which they have reposed in

their employees. My own notion of this "perfect confidence" is that in ninety cases out of a hundred it is not genuine confidence at all, but a mere excuse for business shiftlessness or lack of system. The law relating to actions for personal injuries provides that a man whose body has been injured by the carelessness of another must, in order to entitle him to claim damages, prove not only that carelessness, but also his own freedom from negligence contributing to or causing the injury. If every business man who suffers from a defaulting employee were obliged to prove not only the employee's crime, but the absence of substantial business carelessness on his own part, which afforded both the opportunity and the temptation for the offense, how few convictions of these defaulters there would be! It is a great misfortune that those who speak so eloquently and so often on the duty of "faith in man," and who expound this doctrine as though it had no

limitations or qualifications whatever, do not devote at least a substantial portion of their attention to expounding earnestly the equally important duty which each man owes his fellow of not throwing unnecessary moral stumbling-blocks in his way. It is curious that almost the only "temptation" which receives any particular attention from moralists, either in the pulpit or elsewhere, is that occasioned by one man offering spirituous beverages to another who may be inclined to indulge in potations to excess. By some odd distortion of moral values, the custom of "treating" has been singled out as though it were the greatest or most important of those actions or omissions by which we cause our neighbors or employees to offend. Who ever heard a sermon or lecture on the duty of keeping reasonably strict oversight on one's employees, or on the duty of having a business system which shall reduce the opportunities of dishonesty to a mini-

mum? The duty of not putting on the character of another a greater burden than it can safely bear is as important as any duty in the realm of morals, and the matter of temperance is only one branch of it, and by no means the most important. An examination of the daily criminal calendars in the courts of the large cities conclusively proves this fact. In early days, when property was mainly in land or its products, and when business life moved more slowly than it does in these flush times, the temptations and opportunities for crimes against property were far less frequent. We are not essentially a systematic people. Our tendency is to do business on as large a scale as possible, without that regard for detail which is exhibited in the more cumbrous business methods of countries in which the margins of profit are narrower, and where commercial transactions are not conducted with the astonishing rapidity which characterizes our own. To a large

extent these defects in system are more or less necessary to and inherent in these peculiar methods and habits of our business life. They are nevertheless defects, and should not be so consistently ignored and overlooked as they generally have been in the past. We are paying greater attention yearly to the physical discomforts of the worker, trying to relieve the overburdened, and to lighten the load of hard work which has fallen so heavily in our struggle for commercial supremacy, particularly on the women and children. This is all excellent, but we must remember that we have no more right to overload a man's morals than his back, and that while it is a duty as well as a privilege to have faith in our fellows, we should temper that faith with common sense, so that our faith may be to them a help and a support rather than a stumbling-block and a cause of offense.

II

SENSATIONAL JOURNALISM AND THE LAW

SENSATIONAL JOURNALISM AND THE LAW

So much has been said in recent years concerning the methods and policies of sensational journalism that a further word upon a topic so hackneyed would seem almost to require an explanation or an apology. Current criticism, however, for the most part, has been confined to only one of its many characteristics,—its vulgarizing influence on its readers; by its bad taste, by its daily offenses against the actual, though as yet ideal, right of privacy, by its arrogant boastfulness, mawkish sentimentality, and a persistent and systematic distortion of values in events.

This, the most noticeable feature of yellow journalism, is indicative rather of its character than of its purpose. In

considering, however, the present subject, — sensational journalism in its relation to the making, enforcing, and interpreting of law, — we enter a different field, that of the conscious policies and objects with and for which these papers are conducted. The main business of a newspaper as defined by journalists of the old school is the collection and publication of news of general interest coupled with editorial comment upon it. The old-time editor was a ruminative and critical observer of public events. This definition of the functions of a newspaper was long ago scornfully cast aside as absurdly antiquated, and insufficient to include the myriad circulation-making enterprises of yellow journalism. These papers are not simply purveyors of news and comment, but have what may be called, for lack of a better term, constructive policies of their own. In the making of law, for example, not content with

mere criticism of legislators and their doings, the new journalism conceives and exploits measures of its own, drafted by its own counsel, and introduced as legislative bills by statesmen to whom flattering press notices and the publication of an occasional blurred photograph are a sufficient reward. Not infrequently, measures thus conceived and drafted are supported by specially prepared "monster petitions," containing thousands of names, badly written and of doubtful authenticity, of supposed partisans, and by special trains filled with orators and a heterogeneous rabble described in the news columns as "committees of citizens," who at critical periods are collected together and turned loose upon the assembled lawmakers as an impressive object lesson of the public interest fervidly aroused on behalf of the newspaper's bill.

The ethics of persuasion is an interesting subject. It falls, however, outside

the scope of this article. It is impossible to lay down any hard and fast rule by which to determine in all cases what form of newspaper influence is legitimate and what is illegitimate. The most obvious characteristic of yellow journalism in its relation to lawmaking is that it prefers ordinarily to obtain its ends by the use of intimidation rather than by persuasion. The monster petition scheme just referred to is merely one illustrative expression of this preference. When a newspaper of this type is interested in having some official do some particular thing in some particular way, it spends little of its space or time in attempting to show the logical propriety or necessity for the action it desires. It seeks first and foremost to make the official see that *the eyes of the people are on him*, and that any action by him contrary to that which the newspaper assures him the people want would be fraught with serious personal conse-

quences. The principal point with these papers is always "the people demand" (in large capitals) this or that, and the logic or reason of the demand is obscured or ignored. It is the headless Demos transformed into printer's ink. If by any chance an official, so unfortunate as to have ideas of his own as to how his office should be conducted, proves obdurate to the demands of the printed voice of the people, he becomes the target for newspaper attacks, calculated to destroy any reputation he may previously have had for intelligence, sobriety of judgment, or public efficiency, his tormentor, so far as libel is concerned, keeping, however, as Fabian says, "on the windy side of the law." An amusing illustration of this kind of warfare occurred in New York some years ago, when for several weeks one of these newspapers published daily attacks upon the president of the Board of Police Commissioners, because this commis-

sioner refused to follow the newspaper theories of the proper way of enforcing, or rather not enforcing, the Excise Law. The newspaper took the position that while the powers of the Police Department were being largely turned to ferreting out saloon-keepers who were keeping open after hours or on Sundays, the detection of serious crimes was being neglected, and that a "carnival of crime," to use the picturesque wording of its headlines, was being carried on in the city. Finally, in one of its issues the paper published a list of thirty distinct criminal offenses of the most serious character, such as murder, felonious assault, burglary, and grand larceny, all alleged to have been committed within a week, and in none of which, it asserted, had any criminal been captured nor any stolen property been recovered. Events following immediately upon this last publication showed that the newspaper had erred grievously in its estimate of this

particular official under attack. A few days later, the police commissioner, Mr. Roosevelt, published in the columns of all the other newspapers in New York the result of his own personal investigation of these thirty items of criminal news, showing conclusively that twenty-eight of them were canards pure and simple, and that in the remaining two police activity had brought about results of a most satisfactory kind. Following this statement of the facts was appended an adaptation of some fifteen or twenty lines from Macaulay's merciless essay on Barrère, perhaps the finest philippic against a notorious and inveterate liar which the English language affords, so worded that they should apply not merely to the newspaper which published this spurious list of alleged crimes, but to the editor and proprietor personally. The carnival of crime ended at once.

It is, of course, impossible to determine accurately the extent of newspaper

influence upon legislation and the conduct of public officials by these systematic attempts at bullying. Making all due allowance, however, there have been within recent years many significant illustrations of the influence of yellow journalism upon the shaping of public events. Mr. Creelman is quite right in saying, as he does in his interesting book "On the Great Highway," that the story of the Spanish war is incomplete which overlooks the part that yellow journalism had in bringing it on. He tells us that some time prior to the commencement of hostilities, a well-known artist who had been sent to Cuba as a representative of one of these papers, and had there grown tired of inaction, telegraphed his chief that there was no prospect of war, and that he wished to come home. The reply he received was characteristic of the journalism he represented: "You furnish the pictures, we will furnish the war." It is charac-

teristic because the new journalism aims to direct rather than to influence, and seeks, to an extent never attempted or conceived by the journalism it endeavors so strenuously to supplant, to create public sentiment rather than to mould it, to make measures and find men.

The larger number of the readers of the great sensational newspapers live at or near the place of publication, where the half-dozen daily editions can be placed in their hands hot from the press. The news furnished in them is, for the most part, of distinctively local interest. In their columns the horizon is narrow and inexpressibly dingy. Detailed narrations of sensational local happenings, preferably crimes and scandals, are given conspicuous places, while more important events occurring outside the city limits are treated with telegraphic brevity. These papers constitute beyond question the greatest provincializing influence in metropolitan life.

The particular local functions of sensational journalism which bring it in close relation to the courts result from its self-imposed responsibilities as detective and punisher of crime, and as director of municipal officials. So far as the latter are concerned, yellow journalism apparently has a good record. Many recent instances might, for example, be cited where these newspapers, acting under the names of "dummy" plaintiffs, have sought and obtained preliminary or temporary injunctions against threatened official malfeasance, or where they have instituted legal proceedings to expose corrupt jobbery. As to the actual results thus accomplished, other than the publicity obtained, the general public is not in a position to judge. Temporary injunctions granted merely until the merits of the case can be heard and determined are of no particular value if, when the trial day comes, the newspaper plaintiff fails to appear, the case is dis-

missed, and the temporary injunction vacated. On such occasions, and they are more frequent than the general public is aware, the newspaper takes little pains to inform its readers of the final results of the matter over which it made such hue and cry months before.

But however fair-minded persons may differ as to the results actually obtained by these newspaper law enterprises in the civil courts, there is less room for difference of opinion as to the methods with which they are conducted. Almost invariably they are so managed as to convey to the minds of their readers the idea that the decision rendered, if a favorable one, has not come as the result of a just rule of law laid down by a wise and fair-minded judge, but has been obtained rather in spite of both law and judge, and wholly because a newspaper of enormous circulation, championing the cause of the people, had wrested the law to its clamorous authority. The

attitude of mind thus created is well exemplified in a remark made to me by a business man of more than ordinary intelligence, in discussing an injunction granted in one of these newspaper suits arising out of a water scandal: "Why, of course Judge —— granted the injunction. Everybody knew he would. There is not a judge on the bench who would have the nerve to decide the other way with all the row the newspapers have made about it. He knows where his bread is buttered."

One of the great features of counting-house journalism is its real or supposed ability in the detection and punishment of crime. Whether this field is a legitimate one for a newspaper to enter, need not be discussed here. It goes without saying that an interesting murder mystery sells many papers, and if, as a result of skillful detective work, the guilty party finally is brought to the gallows or the electric chair, it is a tri-

umph for the paper whose reporters are the sleuths. While such efforts when crowned with success are the source probably of much credit and revenue, there are various disagreeable possibilities connected with failure which the astute managers of these papers can never afford to overlook. While verdicts in libel suits in this country compared with those in England are generally small, and the libel law itself is filled with curious and antiquated technicalities by which verdicts may be avoided or reversed, nevertheless there is always the possibility that an innocent victim of newspaper prosecution will turn the tables and draw smart-money from the enterprising journal's coffers. The acquittal of the person who has been thrust into jeopardy by newspaper detectives is obviously a serious matter for the paper. On the other hand, there are no important consequences from conviction except of course to the person con-

demned. Is it to be expected that the newspaper under such circumstances will preserve a disinterested and impartial tone in its news columns while the man in the dock is fighting for his life before the judge and jury? Is it remarkable that during the course of such a trial the newspaper should fill its pages with ghastly cartoons of the defendant, with murder drawn in every line of his face, or that it should by its reports of the trial itself seek to impress its readers with his guilt before it be proved according to law? that it should send its reporters exploring for new witnesses for the prosecution, and should publish in advance of their appearance on the witness stand the substance of the damaging testimony it is claimed they will give? that it should go even farther, and (as was recently shown in the course of a great poisoning case in New York city, the history of which forms a striking commentary on all these abuses)

actually pay large sums of money to induce persons to make affidavits incriminating the defendant on trial? Unfortunately, too often these efforts receive aid from prosecuting officers, whose sense of public duty is impaired or destroyed by the itch for reputation and a cheap and tawdry type of forensic triumph. Despicable indeed is the district attorney who grants interviews to newspaper reporters during the progress of a criminal trial, and who makes daily statements to them of what he intends to prove on the morrow — unless prevented by the law as expounded by the trial judge. A careful study of the progress of more than one great criminal trial in New York city would show how illegal and improper matter prejudicial to the person accused of crime has been ruled out by the trial court only to have the precise information spread about in thousands upon thousands of copies of sensational newspapers, with a reason-

able certainty of their scare headlines, at least, being read by some of the jury. The pernicious influence of these journals on the courts of justice in criminal trials (and not merely in the comparatively small number in which they are themselves the instigators of the criminal proceedings) is that they often make fair play an impossibility. The days and weeks that now are not infrequently given to selecting jurors in important criminal cases are spent in large measure by counsel in examining talesmen in an endeavor to find, if possible, twelve men in whose minds the accused has not been already "tried by newspaper" and condemned or acquitted. When the public feeling in a community is such that it will be impossible for a party to an action to obtain an unprejudiced jury, a change of venue is allowed to some other county where the state of the public mind is more judicial. It is a significant fact that nearly all applica-

tions in New York city for such change in the place of trial have been for many years based mainly upon complaints against the inflammatory zeal of the sensational press.

The courts in Massachusetts (where judges are not elected by the people, but are appointed by the governor) have been very prompt in dealing in a most wholesome and summary way with editors of papers publishing matter calculated to affect improperly the fairness of jury trials. Whether it be from better principles or an inspiring fear of jail, the course of public justice in that State receives little interference from unwarranted newspaper stories. Some of the cases in which summary punishment has been meted out from the bench to Massachusetts editors will impress New York readers rather curiously. For example, just before the trial of a case involving the amount of compensation the owner of land should receive for his

land taken for a public purpose, a newspaper in Worcester informed its readers that "the town offered Loring (the plaintiff) $80 at the time of the taking, but he demanded $250, and not getting it, went to law." Another paper published substantially the same statement, and both were summarily punished by fine, the court holding that these articles were calculated to obstruct the course of justice, and that they constituted contempt of court. During the trial of a criminal prosecution in Boston, a few years ago, against a railway engineer for manslaughter in wrecking his train, the editor of the Boston "Traveler" intimated editorially that the railway company was trying to put the blame on the engineer as a scapegoat, and that the result of the trial probably would be in his favor. The editor was sentenced to jail for this publication. The foregoing are undoubtedly extreme cases, and are chosen simply to show the extent to which some

American courts will go in punishing newspaper contempts. All of these decisions were taken on appeal to the highest court of the State and were there affirmed. The California courts have been equally vigorous of recent years, in several cases, notably in connection with publications made during the celebrated Durant murder trial in San Francisco. The English courts are, if anything, even more severe in this class of cases, a recent decision of the Court of King's Bench being a noteworthy illustration. During the course of the trial of two persons for felony, the "special crime investigator" of the Bristol "Weekly Dispatch" sent to his paper reports, couched in a fervid and sensational form, containing a number of statements relating to matters as to which evidence would not have been admissible in any event against the defendants upon their trial, and reflecting severely on their characters. Both of the defendants referred to were

convicted of the crime for which they were indicted, and sentenced to long terms of imprisonment. Shortly after their conviction and sentence, the editor of the "Dispatch" and this special crime investigator were prosecuted criminally for perverting the course of justice, and each of them was sentenced to six weeks in prison. Lord Alverstone, who rendered the opinion on the appeal taken by the editor and reporter, in affirming the judgment of conviction, expresses himself in language well worth repeating. He says: [1] —

"A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible, and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offense charged against him, the due course of law and justice is nevertheless perverted and obstructed if those

[1] 1 K. B. (1902) 77.

who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt, or imputations against his life and character to which the laws of the land refuse admission as evidence."

In the State of New York the courts have permitted themselves to be deprived of the greater portion of the power which the courts of Massachusetts, in common with those of most of the States, exercise in punishing for contempt the authors of newspaper publications prejudicial to fair trials. Some twenty-five years ago the state legislature passed an act defining and limiting the cases in which summary punishment for contempt should be inflicted by the courts. Similar legislation has been attempted in other States, only to be declared unconstitutional by the courts themselves, holding that the power to punish is inherent in the judiciary independent of legislative authority, and

that, as the Supreme Court of Ohio says, "The power the legislature does not give, it cannot take away." But while the courts of Ohio, Virginia, Georgia, Indiana, Kentucky, Arkansas, Colorado, and California have thus resisted legislative encroachment upon their constitutional powers, the highest court of New York has submitted to having its power to protect its own usefulness and dignity shorn and curtailed by the legislature. The result is that while by legislative permission they may punish the editor or proprietor of a paper for contempt, it can be *only* when the offense consists in publishing "a false or grossly inaccurate report of a judicial proceeding." The insufficiency of such a power is apparent when one considers that the greater number of the cartoons and comments contained in publications fairly complained of as prejudicing individual legal rights are not, and do not pretend to be, "reports" of judicial proceedings at all, but relate

entirely to matters "outside the record." If the acts done, for example, in any of the cases cited as illustrations above, had been done under similar circumstances in New York, the New York courts would have been powerless to take any proceeding whatever in the nature of contempt, against the respective offenders. The result is that in the State which suffers most from the gross and unbridled license of a sensational and lawless press the courts possess the least power to repress and restrain its excesses. A change of law which shall give New York courts power to deal summarily with trial by newspaper is imperatively needed.

To the two examples which have just been given of the direct influence which counting-house journalism seeks to exert upon judges and jurors might be added others of perhaps equal importance. But all improper influences upon legislators or other public officials, or upon judges or jurors, which these papers may exer-

cise or attempt to exercise, are as naught in comparison with their systematic and constant efforts to instill into the minds of the ignorant and poor, who constitute the greater part of their readers, the impression that justice is not blind but bought; that the great corporations own the judges, particularly those of the Federal courts, body and soul; that American institutions are rotten to the core, and that legislative halls and courts of justice exist as instruments of oppression and to preserve the rights of property by denying or destroying the rights of man. No greater injury can be done to the working people than to create in their minds this false and groundless suspicion concerning the integrity of the judiciary. In a country whose political existence, in the ultimate analysis, depends so largely upon the intelligence and honesty of its judges, the general welfare requires not merely that judges should be men of integrity, but that the people should believe them

to be so. It is this confidence which counting-house journalism has set itself deliberately at undermining. It is not so important that the people should believe in the wisdom of their judges. The liberty of criticism is not confined to the bar and what Judge Grover used to call "the lawyer's inalienable privilege of damning the adverse judge — out of court." There is no divinity which hedges a judge. His opinions and his personality are proper subjects for criticism, but the charge of corruption should not be made recklessly and without good cause. It is noticeable that this charge of corruption which yellow journalism makes against the courts is almost invariably a wholesale charge, rarely accompanied by any specific accusation against any definite official. These general charges are more frequently expressed by cartoon than by comment. The big-chested Carthaginian labeled "The Trusts," holding a squirming Federal judge in his fist, is a cartoon which

in one form or another appears in some of these papers whenever an injunction is granted in a labor dispute at the instance of some great corporation. Justice holding her scales with a workingman unevenly balanced by an immense bag of gold; a human basilisk with dollar marks on his clothes, a judge sticking out of his pocket, and a workingman under his foot; Justice holding her scales in one hand, with the other one conveniently open to receive the bribe that is being placed in it, — these and many other cartoons of similar character and meaning are familiar to all readers of sensational newspapers. If their readers believe the cartoons, what faith can they have left in American institutions? What alternative is offered but anarchy, if wealth has poisoned the fountains of justice; if reason is powerless and money omnipotent? If the judges are corrupt, the political heavens are empty.

There is no occasion to defend the

American judiciary from charges of wholesale corruption. They might be passed over in silence if they were addressed merely to the educated and intelligent, or to those familiar by personal contact with the actual operations of the courts. That there are many judicial decisions rendered which are unsound in their reasoning may readily be granted. It may be admitted that some of the Federal judges are men of very narrow gauge, and that, during the recent coal strike, for example, in granting sweeping, wholesale injunctions against strikers they have accompanied their decrees at times with opinions so unjudicial, so filled with mediæval prejudice and rancor against legitimate organizations of working people, as to rouse the indignation of right-minded men. But prejudice and corruption are totally dissimilar. There is always hope that an honest though prejudiced man may in time see reason. This hope inspires patience and forbear-

ance. Justice can wait with confidence while the prejudiced or ultra-conservative judge grows wise, and the principles of law are strongest and surest when they have been established by surmounting the prejudice and doubts of many timid and over-conservative men. But justice and human progress should not and will not wait until the corrupt judge becomes honest. To thoughtful men the severest charge yet to be made against this new journalism is not merely the influence it attempts to exert, and perhaps does exert, in particular cases, but that wantonly and without just cause it endeavors to destroy in the hearts and minds of thousands of newspaper readers a deserved confidence in the integrity of the courts and a patient faith in the ultimate triumph of justice by law.

III

UNPUNISHED COMMERCIAL CRIME

UNPUNISHED COMMERCIAL CRIME

PERHAPS the most important present criticism of American criminal law is that it is content with the performance of only a part of the functions which the moral welfare of the community increasingly requires it to exercise; that it devotes too much attention to elementary crimes, and fails to recognize that the peculiarly dangerous crimes of our day are those which the changed conditions of modern life have made possible, and the detection of which, for the most part, is beyond the scope of the police system.

The principles of criminal law, as that term is used to-day, were formulated in ancient times to meet the requirements of an essentially agricultural community,

when the citizen required protection from crimes of violence rather than from the more modern crimes of craft. With the development of the police system our ability to cope with wrongs of violence has steadily increased. These ancient offenses through all ages have been offenses primarily against the life and safety of the individual citizen.

Crimes of the new type, however, affect not only the individual, but in a more immediate and special sense the moral welfare of the community itself.

These crimes may be described roughly as crimes of fraud, perpetrated either upon merchants or upon the general public. Fraud in obtaining credit by falsehood; fraud in concealing and conveying property to avoid the just demands of creditors; fraud in stealing trademarks and trade-names; fraud in the substitution, adulteration, and misrepresentation of goods; fraud in bribing "commissions," and "special rebates;" fraud in

the promotion, organization, inflation, management, and destruction of corporations; fraud in a hundred manifestations which daily are being fostered and encouraged by success, and rarely are deterred by anything resembling punishment.

There is, perhaps, no occasion for pessimism in this connection, but it seems quite apparent that there is in the great cities a constantly increasing volume of business done which is either fundamentally fraudulent, or which depends upon fraudulent means for the large financial success which it often obtains. Take, for example, the Sunday edition of almost any great metropolitan newspaper and study its advertising columns. Leaving out of account the department store announcements and the want columns, consider what a large part of the remaining advertisements bears the mark of almost obvious fraud. During the past few flush years these papers have been crowded with alluring advertisements of corpo-

rations with enormous capitalization, whose stock is issued, generally in small denominations, to place it within the reach of "small investors:" tempting gold and copper mines for the discontented janitress and ambitious elevator man, corporations with new processes and machinery to revolutionize the manufacture of household articles or necessities, corporations exploiting startling inventions calculated, on paper, to reverse the ways of commerce. An investigation would probably show that a majority of these companies are created solely for the purpose of selling stock, and without the slightest intention on the part of their promoters or officers of doing any legitimate business with the money acquired. During the Klondike fever, a few years ago, corporations of this kind were born daily in New Jersey and West Virginia, with enormous paper capital, with a reasonable sprinkling of respectability in their directorates, and with glittering

prospectuses, compared to which the South Sea Bubble was both honest and conservative. It may be doubted whether of the dozens of these highly advertised companies, organized to sell stock and work the gold mine of public credulity, there is one in active existence to-day. The harvest was reaped, and, their purpose being accomplished, they faded away "to the nothing they set out from," leaving no trace of their existence except beautifully engraved certificates of stock in the sewing-machine drawer of the seamstress, or tucked away in the family Bible of the flat parlor. So accustomed have we grown to these companies, with their prospectuses full of fraudulent misstatements, over-valuations, and overestimates, that they long ago became a popular topic for our shiftless American humor. A problem in America has to begin by being a jest, and we laugh at our troubles long before we think of doing anything to remove them.

Study the "Business Opportunities." What proportion of them are above the suspicion of being mere baits for catching gudgeons? As for the Wall Street advertisements, the "market letter people," the "pool" riggers, the inevitable "clerk in the office of a large corporation who will confidentially sell information of a certain movement in its stock," the turf-guide companies with their daily tips, they require no comment. So far as drugs and medicines are concerned, we are so accustomed to quack nostrums that we consider them with the utmost toleration, and accept good-naturedly the maxim of one of the most successful of modern "nerve invigorators," that "the value of an advertised medicine depends on what you put on the bottle rather than on what you put in it."

This country is notorious for its general indifference to adulteration and substitution of foods and drugs. Even when

the article is found to be highly dangerous to health, actual punishment of its promoters is exceedingly rare. An amusing recognition of America as the natural home of food frauds was given recently in Germany, where the harsh government had pounced upon the prosperous manufacturers of a so-called Rhine wine which contained some rather remarkable adulterations. The manufacturers made a strong though ultimately unsuccessful plea to be left in peace. They maintained that they had never sold a bottle of their decoction in Germany, but were engaged solely in trade with the United States; that their business was very large, and afforded employment to many German workmen; and that an attack made upon their business would be an attack upon many other business houses likewise employing German workmen, and likewise engaged exclusively in export business to the United States.

A lengthy consideration of common

forms of commercial fraud daily practiced is unnecessary, and would extend this paper beyond reasonable limits. The subject of "business graft" alone would afford a topic in itself, — that form of criminal conspiracy which finds daily illustration through the whole length and breadth of business life, from the cook, whose beer bottles are charged up by the grocer, to the purchasing agent of the railroad, who grows rich by secret commissions on everything which, through him, his company buys. The point is not that these frauds exist, for every one knows that they exist and flourish luxuriantly. The significant thing is that in this country we do not think of these modern forms of criminal business as proper subjects for treatment by criminal law, and often we do not consider them as crimes at all.

Fraud accomplished by ancient methods, larceny of the simple and obvious type by the common criminal, we meet

readily enough, but on crime of a more intellectual kind, particularly crime in the business methods and expedients of highly successful financiers and business men, we hesitate to put the mark of public disapproval. We have not yet realized the peculiarly corrupting influence of these offenses. In medicine we long ago learned that among bodily ailments smallpox and diphtheria were highly dangerous to the community, and with these diseases our health boards deal with commendable promptness, because they are recognized not only as serious diseases, but as highly contagious ones. Should not the criminal courts perform the functions of health boards in preserving the community from moral epidemics? In dealing with crime, should not they deal with greater vigor with its more contagious form? Which, for example, is really the greater enemy of American society, the Mulberry Bend Italian who in a fit of jealous frenzy mur-

ders his wife, or the promoter of a heavily watered corporation who, by a fraudulent prospectus, induces the foolish innocent to lose thousands upon thousands of honestly earned dollars? At the crime of the Italian the moral sense of the community is shocked. Even his poor neighbors in his own tenement regard his offense with horror. The sphere of influence of such a murder is comparatively small, and the whole machinery of the law is immediately turned upon the criminal. If he flies, the police of the whole country aid in the search for him. He is quickly captured, quickly tried, and lifelong imprisonment is the penalty. To the promoter whose successful operations enable him to live a life of ostentatious luxury, and with whom reputable men are apparently not unwilling to associate, the criminal law ordinarily has nothing to say. As for the young men who see him living in elegance, with the profusion of worldly goods his methods

have gained for him, who enjoy the hospitality of his automobile or his yacht, is it surprising that they should learn to think that there is a better way of getting money than by earning it, or that they also should become earnest students of that all too prevalent form of business success whose triumph consists in making plenty of money and keeping out of jail?

Another phase of the influence of the fraudulent promoter is in the effect of his efforts upon legitimate enterprises. Comparatively few of the investors who lost money in his "operation" because they thought his promising scheme afforded a legitimate means of investment for them could again be induced by any amount of persuasion to embark in another corporate venture, however honest or highly commended.

When shall we begin to consider the real importance of dealing vigorously through the criminal courts with the modern business vampire? By what pro-

cess of reasoning can we make a moral distinction between the larceny of the despised green-goods or gold-brick swindler and the equally real larceny accomplished, for example, by the rich and quasi-respectable promoters of the United States Ship-Building Company, that bubble of fraud concerning which the public press has said so much recently. The trustee who hazards the funds of his trust estate in Wall Street gambling, and loses, speedily learns to his sorrow that his offense is embezzlement, and his punishment severe. How do we distinguish between the conduct which places him behind the bars of a prison and that, for example, of the president and directors of the trust company so closely associated with the shipbuilding swindle, upon which the financial report of the New York state bank examiner has recently been made public? That report shows that these directors made illegal and practically unsecured loans of enormous

amounts, and permitted their president to use his official position, and the money of stockholders and depositors, to gamble in floating a so-called trust of the most flagrantly fraudulent character. Illegal loans to this president were made to ten times the amount which was authorized by the banking law, and the trust company preserved its solvency only by reducing its capital fifty per cent. "Its losses wiped out its entire surplus and necessitated the sacrifice by stockholders of over one half their holdings. Over a million dollars was charged to profit and loss." The state bank examiner, from whose report the last sentence is quoted, closes that report with a series of recommendations for *new* bank legislation to prevent acts which he says "flagrantly transgress the law." It is significant, however, that, notwithstanding this series of recommendations as to needed banking law, there is no suggestion that the existing *criminal* law be in any wise

put in motion to punish such offenses by such highly respectable offenders, nor does the examiner comment upon the inadequacy of that law for such a purpose, nor advise any remedial amendments.

Is it not more important, in the temper of these times, that the community should be both able and willing actually to punish as crimes offenses of which these are but types, than that half a dozen slum murderers should undergo sentence? We suffer from no general temptation to commit murder, but far too many of us, and not merely the poor and needy ones either, do suffer from temptations to make too much money in quick and devious ways. The failure of the criminal courts to reach these types of offenses and offenders can but be far-reaching in the evil consequences which inevitably follow from it, in undermining the national moral sense which the criminal courts were created to strengthen and support.

The facts brought out by the investigation of the management of several of the large insurance companies recently made by a committee of the New York legislature are too fresh in the public mind to require repetition here. What, if any, criminal prosecution will result from the exposure of official malfeasance made through the investigation, it is impossible to predict. No indictments have as yet been found. The public, which through the press is now clamoring for indictments and for the punishment by law of the officials whose personal reputations for integrity have collapsed under the investigation, is not in a position to note the significant absence of any provision, through which the more serious offenses of these officers can be reached, in the chapter of the Penal Code of New York relating to misconduct and fraud in the management of insurance corporations. Whether there are other provisions of the Penal Code by which the

lawless actions of these trustees can be punished remains for the ingenuity of the public prosecutor to discover. Criminal law in this country has not been written with a view to meeting all the varied necessities of the high financier, and the work of this investigating committee will not be complete unless there follows its report a long-needed extension of that law to cover corrupt practices in the organization and management of corporations which are now untouched by it. There is no reason for assuming that insurance companies are the only great corporations whose officers have curious notions of business integrity, or that their directors alone are blind or indifferent to their duties.

The insurance investigation gives a long-needed prominence to one evil in particular by which safety is afforded to essentially criminal operations of "financiers" in control of large corporations. The attention of the public has been

called to the fact that for years the policy-holders in these large insurance companies, by a section of the state Insurance Law, have been practically denied access to the courts either to protect their own rights or to protect their companies from the plundering, extravagance, and stock-jobbing which this investigation has disclosed. Legal responsibility is the best tonic for moral responsibility that man can devise. It is a dangerous thing for any corporation officer, even of the most inveterate respectability, to find himself in a favored class where his actions are beyond the reach of judicial scrutiny. Irresponsibility is the mother of corruption. Thieves perform their depredations preferably in the dark, and this statutory darkness, created by law for the protection of conscienceless freebooters in trust funds, should no longer continue.

This particular statute prohibiting suits by policy-holders against insurance companies, except with the consent of the

Commissioner of Insurance, is interesting, not only because of the close relation of this crime-breeding statute to the scandals of these companies, but also because it is an extreme illustration of the strong tendency of the law to over-protect from interference or accountability majority interests and the officers representing such interests in corporations generally.

The growing demand for greater publicity in corporation matters has for its basis the conviction, deepened by bitter experience, that corporation laws which permit the exercise of wide powers by corporate officers and directors are dangerous unless offset by guaranteeing to stockholders the right to scrutinize their actions and prevent or punish wrongdoing. Power practically irresponsible and unbridled is sure to create extraordinary temptations. Macaulay tells us of Lord Clive's bold retort to Parliament when called to account for his plundering in India. He described in vivid

language the situation in which his victory placed him, — an opulent city, afraid of being given up to plunder, wealthy bankers bidding against each other for his smiles, vaults piled with gold and jewels open to him alone. "By God, Mr. Chairman," he exclaimed, "at this moment I stand astonished at my own moderation!"

The conditions which tend to make sordid and unromantic Lord Clives in the financial world exist where laws permit directors to decide what, if any, inspection of the records of a company shall be afforded to its stockholders, or which place statutory restrictions on stockholders' suits in the courts.

Even when such statutory restrictions do not exist, a wilderness of technicalities has to be passed through before a stockholder can succeed in obtaining for his company redress in the courts for wrongs done to it by its officers. An additional discouragement against such suits is well

illustrated by a recent case in New York. A minority stockholder of an over-capitalized corporation compelled by legal proceedings a highly respectable Board of Directors to pay personally into the treasury of the company $685,000, the amount which had been unlawfully paid out by them in dividends which had never been earned. These dividends, whereby an entirely fictitious value had been given to the stock itself, had been declared from the money paid in by stock-buyers. The declaration of such dividends is a crime. After this very valuable service had been rendered to this company, resulting in the return to it of this very large sum, the attorneys for the stockholder sought to have their fee paid from the money thus recovered. It would certainly seem as a matter of elementary justice, as well as of good public policy, that a stockholder who had performed such signal service as this to his company should not be compelled to bear person-

ally the presumably large legal expense which his action had entailed, and that a service rendered, not solely for the personal benefit of this single stockholder, but for that of all stockholders, should be borne by the company itself representing all the stockholders, and not by a single individual. The Court of Appeals, however, has decided that under the law these attorneys had no lien upon the funds recovered by them, and that the stockholder who retained them must pay their fees.

The excuses offered for these restrictive statutes and for the policy of the courts regarding these suits, while plausible, are not sufficient. It need not be denied that there is a great deal of legal banditry and blackmail practiced on great corporations in proceedings at law instituted solely for stock market purposes by unscrupulous lawyers backed by unprincipled brokers. But it is as logical practically to refuse the courts to

outraged minority interests because blackmail can be practiced, as it would be to deny the right of private property because some men are thieves. Rascals out of office are not so dangerous as those in office, and these limitations and restrictions upon stockholders' suits are calculated to afford, and do afford, direct encouragement for essentially criminal financiering by persons in control of corporations thus protected.

As a people we have a curious dislike to punish severely criminals of good social standing who have respectable friends. We take narrow views of the purposes of criminal law. Our conception of the proper use of punishment as a warning to others is limited to old-fashioned crime, and rarely finds practical application to such offenses as we have been considering here. An illustration of this indifference was given a few years ago in an important case in New York city. The officers of a national

bank had permitted their institution to be wrecked by certifying, and thereby, of course, practically guaranteeing, the checks of a firm of stock-brokers for enormous sums when the brokers did not have deposited in the bank the money represented by the checks. This was distinctly forbidden, and made a criminal offense, by the national banking law. The brokers failed, and the bank having closed its doors in consequence, the president of the bank was indicted. A jury having been impaneled to try him, he pleaded guilty, his counsel urging, as a reason for clemency, that the violation of this statute was a habit of the New York banks in the Wall Street district, and that if the wrecked bank had not followed this law-breaking custom of its competitors, the stock-brokers would have withdrawn their account. The plea was successful, and the officer escaped with a small fine. Imagine a burglar or a pickpocket urging a plea for clemency

based on the general business habits and customs of his criminal confrères! In dealing with offenses by criminals of previous good social standing, we rarely look beyond the offender himself to consider the welfare of the community. If, for example, a man steals, and, after his indictment for the crime, his friends or relatives repay the amount of the theft, in America that is the end of the matter, and the offense committed against criminal law devised as a protection for the public is entirely negligible. The greatest bank wrecker in American criminal history now lives undisturbed in New York. He never served a day in jail for a defalcation of three million dollars. The indictments against him were all dismissed a few years ago. He even seems to have returned to some sort of social position, and the society columns of the New York "Times," commenting some time ago upon a reception at his New York home, alluded with becoming grav-

ity to certain Canadian guests as friends whom their host and his family had made "during their long stay in Quebec."

Recorder Goff, the well-known New York criminal judge, in the course of a striking address given before a club of lawyers in New York some time ago, related an incident which deserves repetition in this connection. He had been making the point that in criminal law the present American tendency is to protect the criminal at the expense of society. He illustrated his remarks by a personal incident which, as the writer recollects it, was substantially as follows:

"I was in the City of Mexico," he said, "some years ago, and went through the great city prison in company with the Mexican attorney-general. As we passed along, observing the prisoners, all of them engaged in hard manual labor, one of them, of lighter complexion than the rest, attracted my attention. 'That man looks like an American,' I remarked.

The attorney-general smiled, and said that he was. I then inquired what he was there for, and from the attorney-general's reply, and from a subsequent conversation which I had with the man himself, I learned the following facts: Some years before, in a central State in our own country, two men had been partners in a general real-estate business. They lent money for clients, and had, in addition, the funds of many lodges and fraternal societies in their keeping. They misappropriated this money. Finally, after having exhausted the means of concealment, and having reached a point where discovery was practically certain, they debated together what they should do. What they decided upon was this: they had stolen in the neighborhood of $100,000, and they divided what remained of it; one of them fled to Mexico with his share of the booty, and immediately took steps to become a Mexican citizen, so that he could not be

extradited for trial in the United States; the other stayed at home. After the crime was discovered, the one who stayed at home was indicted and tried. He fought desperately in the courts, but was finally convicted, with a strong recommendation by the jury for clemency. Powerful influences were brought to bear in his behalf, and he received a light sentence of less than two years in prison, which was materially reduced by good behavior. His prison labor consisted in keeping the prison books.

"His partner in crime, who fled to Mexico, was apprehended there, and his extradition was asked for. He had, however, become a Mexican citizen, and under the treaty between Mexico and the United States could not be extradited. Unfortunately for him, this application for extradition brought him to the attention of the Mexican authorities. He could not be sent to the United States for trial, for he was a Mexican citizen,

but he could be and he was prosecuted as a Mexican in Mexico for bringing stolen money into the republic, was sentenced to ten years at hard labor, and was serving that sentence when I saw him. He had about seven years more to serve before he obtained that freedom which his equally guilty American partner then had enjoyed for more than a year."

There are many reasons why the most important part of business crime fails even to reach the criminal courts. In some instances the apparent inadequacy of the possible punishment makes a prosecution seem hardly worth while. The man who, after inducing the business world to give him credit for many thousands of dollars, transfers his property in order to swindle those who have trusted him, may be punished with no greater severity than the man who expectorates on the floor of a public conveyance. There are no reported cases to show that the New York statute, which makes a

misdemeanor of this commonest and meanest offense against honest business, ever has led to the punishment of a single offender. What moral difference can there be between the receiver of stolen goods, knowing them to be stolen, and the person who receives property thus conveyed by a swindling debtor? Yet the former may be punished with five times the penalty of the latter, and while proceedings for the offense of knowingly receiving stolen goods are common in the criminal courts, the reports contain no record of any prosecution of the commercial "fence," the transferee of fraudulently conveyed goods.

An excellent illustration of the attitude of the criminal law in a great commercial State toward essentially criminal methods of doing business is contained in the New York statute which defines the crime of larceny. One section provides generally that this crime is committed when a person obtains property or any

article of value from the true owner, "by color or aid of fraudulent or false representation or pretense." A subsequent section, however, carefully provides that to obtain property "by means of a false pretense is not criminal where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." This special dispensation in favor of the commercial thief is instructive. Apparently it amounts to a license for him to obtain property on credit by any false statement as to his property or his ability to pay which his ingenuity may suggest, and guarantees him immunity from criminal prosecution so long as he avoids putting his falsehood in the form of a written statement, and over his own signature!

Another form of commercial crime which is constantly on the increase is that of counterfeiting trademarks and trade-names. In these days, millions of dollars

are spent annually in giving value to trademarks by advertising. When these trademarks have acquired such value, by reason of the sums invested in them, as to make them second to few forms of commercial property, the necessity of protection against trademark piracy by punishment of the offenders (both from the standpoint of the owner of the trademark and that of the equally deceived and defrauded public) grows more and more apparent. Under the New York law, the offense committed by a man who steals one man's business and another man's name by counterfeiting or imitating a valuable trademark, has not yet risen to the dignity of a felony. The moral difference between forging a man's name to a spurious note and forging his trademark to a spurious box or bottle is hard to see, yet the more ancient form of this commercial crime, the forgery of the paper, may be punished with ten times the severity of the equally important,

though more modern offense. Nor is this all. Not only is the maximum punishment small for trademark counterfeiting, but in actual practice the writer is informed that in New York, at least, the cases in which imprisonment has been imposed have been so few as to be entirely negligible; and the fines have usually been so small as to amount to very little in preventing the growth of these crimes against fair trade. In a very recent case, the only one in the writer's knowledge in which imprisonment was actually imposed for this offense in New York, two men were convicted of having made and sold counterfeit caps and labels sufficient to equip 10,000 bottles in fraudulent imitation of the valuable trademarks of a well-known and heavily advertised whiskey. The fine imposed did not exceed the cash actually obtained by the makers of these fraudulent caps and labels for their goods; and the imprisonment to which

these men were sentenced was only ten days!

The New York Penal Code contains an entire chapter devoted to "Fraudulent Insolvencies by Corporations and other Frauds in their Management." Nearly all the offenses it creates are not felonies, but misdemeanors only, punishable by maximum penalties of a year's imprisonment or $500 fine. For example, one of the commonest ways of giving fictitious value to stock, and of selling large quantities of worthless certificates, is by paying large dividends, not from the actual earnings of the company, but out of the money paid by stockholders for their stock. Stockholders and others, believing from these dividends that the company is actually prosperous and earning money, either increase their holdings, or buy stock at high prices, only to find later that it is worthless. The Penal Code provides that the directors of a corporation who perpetrate this swindle are

guilty simply of a misdemeanor. Equally serious is the action of directors in knowingly making and publishing false statements or reports as to the financial condition of the company of which they are trustees. Whittaker Wright (the great company promoter, who committed suicide after being sentenced to hard labor for issuing false balance-sheets of the wrecked London and Globe Finance Corporation) was convicted in England under a statute substantially similar to this section of the Penal Code. He was sentenced to seven years' penal servitude. Under this New York law the maximum penalty which he could have received would have been one year's imprisonment, or a fine of $500.

Something has been said above as to the offense committed by the directors of a trust company in making illegal loans, ten times larger than those allowed by law, to its president, who was also a director, resulting in the wrecking of the

institution. This, also, is merely a misdemeanor. The adulteration of food and drugs is a misdemeanor, for which in New York, during the past administration of the city government, many prosecutions have been had, almost exclusively, however, in relation to adulterations of milk. The excellent work of the health officers in this connection is a shining example of what can and should be done in the use of criminal law for the protection of the community. The offense of knowingly selling any compound containing a poisonous acid or other substitute for the juice of lemons or other fruit is punishable by a fine of not more than $250, or six months in prison.

It will not do to ascribe the failure of the criminal law to punish commercial crime entirely to defects in the law, or to the inefficiency of its prosecuting officers. The present district attorney of New York county deserves special commendation for his apparent willingness to do

his full duty in these matters, and to punish important types of criminal business even when it requires the exercise of a considerable degree of moral courage to do so. Comment upon the trials of Parks and his associates in the trades-union conspiracies is unnecessary. The public service which those prosecutions did and are doing, not only for honest trades-unionism, but for honest business as well, cannot be extolled too highly. They afford an additional example of what the criminal courts can do in the hands of conscientious and fearless officials when finally supported by the injured persons most concerned. It remains to be seen, of course, whether further action can and will be taken to punish not merely the criminal bosses of labor organizations, but the theoretically more respectable contractors whose bribe money and whose dishonest business principles were at the bottom of this labor trouble.

It would not be surprising, of course,

for an ordinary district attorney to prefer prosecuting simple crime which requires little mental effort from him, or sensational crime which gives him a desired prominence in the papers, to attacking offenses of a less exciting character, which call for a much more careful examination of law and fact; where the offender is likely to be represented by counsel of large abilities; where the punishment, if conviction be obtained, is almost certain to be light, and where, from the social connections of the offender, a suspended sentence would be quite as likely. The real trouble, however, so far at least as crimes are concerned, affecting merchants and the business world is with the business men themselves. Except, perhaps, in a few cases, as, for example, trademark counterfeiting, in which criminal prosecutions are fairly frequent, the attitude of the average business man who has been defrauded toward the swindler is this: If there is a fair chance of get-

ting back a substantial portion of his money quickly, and without too much inconvenience to himself, he will take action in the civil courts, and in New York the delay of the civil courts is such as practically to cause commercial litigation to cease. But if he is certain that the man who wronged him is "judgment proof," and that no money will result from litigation, the average business man will charge the cheat up to profit and loss, and leave the task of criminal prosecution to some one not so busy as he is. He has no time to waste in sitting around criminal courts when all that his expenditure of time can accomplish is merely the punishment of the offender, and not the result, to him more important of, getting his money back. Moreover, having a good opinion of his own business shrewdness, he will not care to advertise the fact that he has met a man "smart" enough to cheat him. It is the same spirit which makes him prefer in

civic matters to endure high taxes and rascality in public office rather than to take a personal interest in politics, and which makes him willing to hang on to a strap, or to pay an additional fare, when he should have a transfer. He is too busy.

A more striking illustration of this state of things cannot be found than is afforded by the working of the Federal Bankruptcy Law. That law establishes a series of criminal offenses punishable by imprisonment. Theoretically, under it a man who deliberately plans to conceal his property, to swear himself a bankrupt and be discharged by law from the just claims of his creditors, has the terrors of criminal prosecution facing him. Fraudulent sworn schedules in bankruptcy, fraudulent concealment of assets by alleged bankrupts, and perjury in bankruptcy proceedings are notoriously common, as every business man knows. Yet, with all the thousands of bankruptcy

cases which have been passed upon by the Federal Courts since the bankruptcy law went into effect, the number of criminal trials for offenses provided for in that law have been so few, and attended with such meagre results, as to justify the statement that this branch of the law has been practically unenforced.[1]

It is the proud affirmation of our

[1] The Bankruptcy Law is seriously defective in containing no adequate provision for criminal punishment for the fraudulent concealment of property in contemplation of bankruptcy. Perjury, however, by alleged bankrupts is punishable. Since this article was written, five bankrupts have in a single month been convicted of such perjury in trials before Judge Holt of the United States District Court in New York city. The learned judge set his brethren on the bench a good example by giving all but one of these criminals adequate sentences of imprisonment, remarking after the conclusion of the trials that if the present practice should be suffered to continue, of obtaining property and then concealing it by means of perjury committed during the course of bankruptcy proceedings, "the bankruptcy act would be impaired practically to the extent of its entire usefulness."

courts that the law is no respecter of persons. It is of the highest public importance that this maxim should not be an extravagant boast, but the expression of a vital reality. In a decade of unparalleled stock-jobbing, marked by the inflation through false prospectuses and devious market manipulations of great corporations, the decline of whose stock involves great losses to thousands of honest investors, the criminal courts should be called upon to illustrate by action that affirmation of the law.

Over a century ago, in England, there was a criminal trial the like of which never before nor since has been witnessed in the legal proceedings of the nations. The country was then filled with men who had returned from India rich with the wealth of an oppressed people, and who flaunted before the eyes of their home-staying neighbors the spoils of foreign crime. The word "nabob" came into the language filled with a meaning

to the moral life of the English people which is not yet forgotten. It signified such a lowering of standards of public morality as perhaps no other word in the language has signified. But the conscience of the people reacted against it. Before the House of Lords, Warren Hastings, the greatest, though not, perhaps, the worst, of nabobs, was tried. He was prosecuted by a galaxy of forensic orators, such as never before were associated in the prosecution of a great criminal. Burke, Fox, and Sheridan represented not merely the House of Commons, but the English people, and the reassertion of the national honor which had been outraged by the criminal actions of the nabob Englishmen in India. That trial, as we know, did not result in the conviction and sentence of the famous offender, but the influence of the prosecution itself on the moral sense of the people of England cannot be overestimated. It meant that the English people

placed upon wealth obtained by criminal oppression the stamp of their indignant disapproval, and by that fact the great prosecution was not a failure, but a signal success.

Conditions have changed. The nabobs of our day derive their enormous revenue not from direct physical oppression of the weak and helpless, but from the more subtle and bloodless ways of devious finance. One of the functions of the criminal law, in these days disregarded or forgotten, is, borrowing the words of Emerson, "to correct the theory of success." It is high time the criminal courts should recognize the present duty, which the conditions of these times make daily more imperative, of drawing definitely the line which shall distinguish before the eyes of all men the finance which is finance from the finance which is crime.

IV

GENEROSITY AND CORRUPTION

GENEROSITY AND CORRUPTION

Some years ago, there died in New York a politician who had been the notorious leader of one of the slum districts. During the greater part of his career, he had been the subject of the most pointed attacks by individuals and organizations interested in decent government, for he had been the enemy of everything which meant honesty in public affairs and social life. He had made money corruptly by extending his favor, under the usual arrangements, to individuals who wanted franchises for gas, electric light, and street railway operations; by affording his protection and influence to "policy men," to pool-room gamblers and disorderly-resort proprietors. His name had been signed hundreds of times

on the bail bonds of thieves and fallen women.

He was a politician of a type common enough in the great American cities, and the characteristics of his career had been long familiar to the newspaper-reading public. Yet when he died, the largest church in the district was filled with a vast crowd of mourners. As the papers said, there was not a dry eye in the church. It was genuine sorrow. For the money which his more reputable gas and railway friends from the brown-stone districts had given him had paid many an old woman's rent, had helped many a friend in trouble. The "protection" money had been freely given to the outings and games of the social organizations of the district. His "pull" had always been available for the man who wanted a job. The money of Peter had gone to an army of Pauls, and the great robber baron had died comparatively poor. He had been a public enemy —

with a big heart; dishonest — and generous.

There are two lines in Tennyson's "Idylls of the King" which seem to embody a kind of fascinating puzzle:—

> . . . "God fulfils himself in many ways,
> Lest one good custom should corrupt the world."

How can any custom which is good be corrupting? Can there be a dangerous virtue? Considerable rumination has persuaded the writer into giving an affirmative answer to the question, the episode of the funeral of the District Leader being only one of the cases in point which have led to this conclusion.

The foundation of healthy, sane life, and of right public law and government, is justice. This is trite and platitudinous enough, but it is dangerous to forget it. The departed District Leader got his power in life and his apology and defense in death from the fact that throughout his career he ignored or abused all

known notions of justice — and was generous instead.

There is a certain dramatic quality in generosity which appeals to the heart. A mean rascal we all despise and hate; but a rascal with a big heart, who never forgets his friends, finds many apologists. It is of the utmost importance to a country organized, like ours, on a democratic basis, that as a people we should be highly sensitive to injustice. That sensitiveness is the most necessary protection for freedom, the greatest force for good government. Anything which tends to befog our ideals of justice, or to make us underestimate its importance, is a danger to be guarded against.

In the latter days of Rome, the darlings of the rabble were the oppressors of Africa, who transmuted the sweat and blood of conquered provinces into bread and circuses for the Roman mob. Justice, long since dead in the imperial city, had been succeeded by a riot of generosity

of the most lavish and barbaric kind. It would be, of course, a jaundiced eye which should make any but a most distant parallel between the Roman rabble and the American people. But much, if not everything, is forgiven the millionaire whose fortune has been wrung from the over-tempted consciences of aldermen, if he recognizes what the college presidents call "The Responsibility of Men of Wealth."

As a people, we have fairly good taste in our attitude toward the philanthropy which finds its root in fraud and unjust enrichment. If a traction magnate or a tricky financier gives us a hospital or art gallery, we do not cry in an offensive chorus, "Where did he get the money?" We accept with a philosophic gratitude anything given back to us collectively which was stolen from us individually, for the excellent reason that, the ill-gotten booty having been once acquired by the great operator, it is a public good

fortune that his expenditure of it should in some degree take the form of public gift, rather than of private wassail or ostentatious extravagance. The great man, we say, was not obliged to spend anything on public charity. His fortune, by whatever devious, crooked ways acquired, is, so far as the legal title is concerned, his, and not ours; and so any portion of it which he may choose to transmute into public service is a just cause for general rejoicing. It all goes to confirm our faith that there are bowels of compassion and spots of virtue in the worst of men, even in our most inveterate millionaires. Having accepted the gift, we refuse to vilify the donor.

One of the effects of the generosity of the unjust, which deserves more consideration than it gets, is this: it closes the mouths of critics whose voices might otherwise be heard in effectual protest against public wrongs or defects which cry for change in economic conditions.

Limitation of space confines the writer to one illustration.

There was public agitation, some years ago, concerning a certain bill, involving a franchise of great value, which was being heavily lobbied through the New York legislature. A movement was at once begun against the measure, and during its progress a gentleman standing justly high in public esteem, a man of unquestionable probity and of great influence, was asked to take part in this protest. He remained in doubt for a few days, and then declined. He was the president of an important charitable institution dependent largely for its support on the generosity of a particular donor, who was also the real sponsor for the grab bill. With what he conceived to be the prosperity of his institution at stake, he could not feel it to be his duty personally to antagonize the corrupt scheme of the generous supporter of his institution. Other able men, he argued, could read-

ily be obtained to do the work which, under the peculiar circumstances, he must refuse to do himself. The gain which the opposition to the lobby for the bill might make by his influence did not seem to him at all equal to the quite probable loss which he felt might come to his institution by such offensive action on his part.

Now this man is normally, and when not subject to peculiar and perplexing circumstances, neither weak nor timid, but quite the contrary. In this particular case he simply had been called on to decide a hard problem. His decision was undoubtedly wrong from an abstract moral standpoint; but in view of the great responsibility which he felt for the welfare of his institution, his error was at least pardonable. He was a man whose silence could not have been bought by any personal consideration. Yet the generosity of a public enemy to his particular institution of charity had effectually closed his mouth.

Just how far the loss of influence of the city churches is due to similar conditions, it is hard to say. To the writer, there seems to be a certain tendency among the great metropolitan churches to plan their expenditures on the basis of the largest amount which may be expected from the richest parishioner. So that in case any two or three heavy contributors should for some reason terminate abruptly their donations, the work of the church would be practically crippled. With the finances of the church built on such a foundation, it is hardly surprising that the sharp edge of pulpit criticism should be dulled, or should find expression, if at all, in innocuous and ineffectual generalities that keep up the brave show of a spiritual independence which has been long since smothered by charity.

The medical world to-day is full of learned talk about germ diseases, and the great scientists are constantly increasing

the fund of human knowledge as to how these germs may be destroyed, or their perpetuation be prevented. If it were only possible for some spiritual scientist to devise some workable scheme to prevent in the moral world the perpetuation of perverted ideals! We read much to-day of the Great White Plague, — tuberculosis, — and how it breeds and spreads in the tenements, destroying its thousands. But the Great White Plague in the rich man's university, the germ of moral tuberculosis in the ideal of success, avoids the microscope.

After all, the principal use of the college is as a place where the next generation is to get right ideas of what is worth while in life itself. The academic facts which to the ignorant seem the advantages of education are of minor importance. We hear much during the season of college commencements of the necessities of the modern university in the way of enlarged endowments and in-

creased equipment. Some of this talk is, of course, reasonable enough. It is addressed mainly to the rich, as a demand for the recognition by them of a duty of generosity, one which in our days has had a most remarkable response. But apparatus is an impossible substitute for ideals, and the best endowment of a college is the character of its graduates. The two-thousand-dollar bequest, for example, to his Alma Mater, which the will of the late William H. Baldwin contained, was small if considered as a mere matter of money, but his character and the ideals of public service which his life expressed form part of that permanent endowment which alone makes a university great. The memory of a railroad president ready to sacrifice, if need be, his position, rather than lose an opportunity for usefulness on an unpaid committee of citizens banded together for important civic service, is a rarer and more precious contribution to the fibre

of university life than any mere material bounty from ravenous fingers unclutched by hypocrisy or the fear of death.

The principal criticism of the generosity to colleges of men whose great fortunes have been obtained by doubtful methods and through suspicious sources is not alone that their money comes coupled with their own personal histories, nor that the hope of their favor has an undesirable influence on certain forms of college teaching and on the public utterance of college officials, but that these gifts of brick and mortar and money have a tendency to make the ideal endowment seem less valuable and important. We cannot afford to have the traditions of our colleges become largely the traditions of suspiciously rich men who made money and built buildings.

It seems like the mere hyperbole of a jealous and disappointed spirit to affirm that the corrupt practices of the unjustly rich are less harmful than their benevo-

lences; but the statement will bear argument and furnish much reason for a belief in its accuracy. It is because this benevolence tends to create in the popular mind confusion on a matter of morals concerning which we cannot afford to have confusion. We cannot afford to believe that the seizing of special and unjust privileges, or the use of corrupt practices or oppression, by which enormous wealth is increasingly acquired, may be excused or palliated by public gift or private benevolence, or by generosity, however bountiful. We cannot afford to let a delayed or partial restitution acquire a false glamour, and under a false name become a substitute for common honesty.

There is no place where the substitution of generosity for justice is a greater evil than in the courts. The great delay which frequently occurs in the selection of jurors in law cases is due to the endeavor of one or the other of the oppos-

ing lawyers — rarely of both — to pick out jurors who will deal justly with the rights of litigants, and who will not be merely generous at the expense of justice. The task of selecting such jurors is increasingly difficult, particularly in accident cases against railways. The injustice which results from the corrupt granting of railway franchises, for example, has a larger area than is generally supposed. There is a strong tendency manifested in juries to even up this original injustice by a generosity which is itself unjust. For injustice almost invariably begets a spurious generosity.

The writer listened, some years ago, in the New York Supreme Court to the trial of an accident case brought by the widow and children of a man who had been killed by the street railway which runs on Broadway, to recover damages from the railroad company for having caused his death. The widow produced only one witness, and his testimony was

clearly perjury from start to finish, while four reputable bystanders called by the railroad clearly showed that the accident had been the result of the recklessness of the deceased: yet the jury, after some delay, brought in a large verdict for the widow and the children. One of the jurors explained his verdict thus: "The railroad company got on to Broadway by putting up a little money to a bunch of aldermen. They got their franchise for next to nothing, and that woman and four children have as good a right to their money as the road has to its franchise. With all the money the road gets out of Broadway, they can afford to do something for that man's family, and I am glad we had a chance to give them the verdict. I could not go home and tell my wife that I had a chance to give some railroad money to a widow and four children, and did not do it. She would put me out of the house."

The railway companies complain bit-

terly, and often with much reason, of the injustice done by such verdicts, but they forget the original injustice which these juries blindly, blunderingly, and unjustly seek to correct.

In politics, as we all know, the worst class of politicians, the one whose power for evil is the hardest to overcome, is the class in which corruption is coated with the whitewash of generosity, — the legislative burglar with a big heart. The log-rolling which is the bane of our politics is nothing more nor less than the exchange of generosities by public servants at public expense, and a large part of bad law-making is the result of the unjustifiable favors which one unconscionably kind-hearted statesman extends to another.

It is, of course, a mean soul which is not warmed by generosity and benevolence and the expression through such acts of the larger humanities. In comparison with true generosity, justice seems

meagre and mean, as the cold working of the intellect rather than the warm pulsation of the heart. Justice, mere justice, never satisfies. Aristides the Just was ostracized by the Greeks, not because he was just, but because he was nothing but just. From fibre like his, heroes are not made. The natural man much prefers Robin Hood. Without generosity the moral world seems dull, gray, cold, and conventional. It lacks sap and vitality, and the imagination is not touched. But, after all, justice is the rock on which alone generosity can safely build, and when it seeks some other foundation, it is the scriptural house built on the sand, and like it cannot endure.

V

THE LITERATURE OF EXPOSURE

THE LITERATURE OF EXPOSURE

The old-time exhorters who made uncomfortable the youth of our fathers had as a special object of their efforts the awakening of the "conviction of sin." To them man, in his natural and unconverted state, was a vile thing, and the hope for his future lay in his recognizing his vileness, his spiritual unworthiness. The last stage of the old-time conversion was reached when a previously comfortable and contented soul felt itself, under the new process of regeneration, tortured and lost in a morass of personal obliquity, when all past shortcomings and sins of omission and commission loomed big and black before it; when it shivered with the thought of the frightful future which must be

the inevitable punishment for an evil past.

In the course of time theology learned that the methods and theories of the old religious exhorters were not only weak, but fundamentally wrong. It learned that the true way of making men better was not by telling them that they were only worms in the eyes of the Almighty, but by teaching them that they were made in his image; that there was a nobility in life itself, and that in the roughest and lowest of human creatures there was a touch of the Divine, the seed at least of immortal worthiness. The hard, unlovely, and unloving spiritual leaders of our fathers' and grandfathers' time told men of their sins and iniquities, made them conscious of their spiritual sores and ulcers, the rags in their raiment, humbled and depressed them. They were destructive critics of life. To-day the spiritual teachers who are doing most for the moral health of the world

are still critics, but constructive rather than destructive in their attitude toward life. They are teachers who believe that man attains his spiritual stature most readily by being told less of what he is not and more of what he is, and who find that the greatest amount of spiritual strength can be developed by interesting man in doing the things which make life worth living. These teachers find that the simplest and best way to help men to escape evil ways is not by eternal threats and warnings, but by causing them to concentrate the greatest possible amount of moral energy on doing something positive and worth while. Hell has dropped out of our modern theology, not so much because we have ceased to believe in it, as because its insufficiency as an instrument for permanent moral regeneration has with the passage of time become more and more apparent; for, while we are sometimes strongly moved by what we

hate and fear, we are perpetually influenced by what we love.

In the past decade there has grown up in this country a school of incomplete idealists, social reformers, who, in their methods and theories, seem to have gone back to the old-time theology. They seek to apply to society as a whole the methods which failed with the individual. From one branch of this cult has come the modern literature of "exposure." Like the three cheerful friends of Job, they show us our social sore spots. They expose in countless pages of magazines and newspapers the sordid and depressing rottenness of our politics; the hopeless apathy of our good citizens; the remorseless corruption of our great financiers and business men, who are bribing our legislatures, swindling the public with fraudulent stock schemes, adulterating our food, speculating with trust funds, combining in great monopolies to oppress and destroy small com-

petitors and raise prices, who are breaking laws and buying judges and juries. They show us the growth of business "graft," the gangrene of personal dishonesty among an honorable people, the depressing increase in the number of bribe-takers and bribe-givers. They tell us of the riotous extravagance of the rich, and the growth of poverty. These exposures form the typical current literature of our daily life. As our appetite grows jaded and surfeited, the stories become more sensational so as to retain our attention. Titus Oates and his plot live again in the amazing historian of modern finance. The achievement of the constructive elements of society has been neglected to give space to these spicy stories of graft and greed.

There are two points in the literature of exposure worthy of note. The first is its extraordinary copiousness, and the second is that so few of the writers who so cleverly point out to us our social

sores seem to have any kind of salve in their hands. "Exposure" has become a peculiar art, which, like some other arts, seems to exist for its own sake.

The editorials and articles which make up the literature of exposure rarely include, even in a very small measure, any useful or careful analysis of bad social conditions, or of those defects in law and its administration through which opportunities for unjust enrichment are afforded to the keen, the unscrupulous, and the over-tempted. These writers do not belong to that class of social critics whose purposeful and devoted studies of economic conditions and of the history of business systems have given us so many suggestions of ways and means for progress. The literature of exposure is not criticism in any such sense, and in comparison is simple indeed. For it exposes, not the opportunities which create temptations, but the individuals who succumb. It seems to arraign, not the defects in

the social system, but humanity itself, by the denunciation of a countless number of individuals who do real or fancied wrongs. It takes the whole burden of moral responsibility from the shoulders of society and throws it all on the individual, instead of making a just apportionment of the load.

There is comparatively little which is constructive about this kind of work, and it is for the most part merely disheartening. Its copiousness and its frequent exaggeration have a strong tendency to make sober and sane citizens believe that our political and business evils cannot be grappled with successfully, not because they are in themselves too great, but because the moral fibre of the people has deteriorated, — a heresy more dangerous, if adopted, than all the national perils which confront us to-day, combined.

In the writer's birthplace, the local undertaker was considered one of the worst men in town. He suffered from having

become incompletely converted. The work of grace with him had gone far enough to convince him that he was an utter wretch and sinner, and so far beyond redemption that there was nothing which could be done about it. His awakened sense of sin kept him a sinner. The literary exhorter whose sole argument is human wickedness and depravity is far too likely to produce the same kind of convert.

As every teamster knows, there is a limit to the amount of extra effort which can be got out of a horse with a whip. In the same way with the community, the sense of its own shortcomings fails as a permanent incentive to improvement. It is as important to the community as it is to the individual that its capacity for being shocked with itself should remain unimpaired. Nothing worse can happen to it than to have its moral cuticle hardened by much drubbing, and made insensitive to criticism. The inherent defect

with much of the literature of exposure is that it exists merely for the shock it gives, and is of no further profit to the community.

We have in this country an almost superstitious reverence for publicity, as though it were a panacea for political and social evils. Give the people the facts, is our comfortable doctrine, and conditions will remedy themselves. But diagnosis and cure are identical neither in printers' ink nor in medicine, and the time will come, even if the writer be wrong in thinking it is now with us, when the feeblest of tonics will do us more good than the most drastic of these modern literary emetics.

It is a curious fact that, when we speak of publicity and its value, we have in mind publicity in its narrow and restricted sense, as the searchlight of public knowledge thrown upon something which is wrong. We make it serve as a sort of social scavenger, as though that

were its greatest instead of its very lowest function. As though that great instrument of civilization were being employed at its best task when engaged in probing, with a prying-hook, our social garbage barrels.

The lives and doings of bad men are too much with us for our own good. Somehow we have conceived the notion that it is more important for us to have copious information about the grafter and the frenzied financier, than about the men who, while doing equally, if not more, important things, are violating no statute or moral law. We need an enlarged conception of the higher possibilities of publicity as an aid and encouragement for right living. We need a change by which the honest merchant, banker, or professional man will feel himself less helplessly isolated through his honesty than he might reasonably conceive himself to be from what he gets to read at the news-stands. What the

Bible says about the inadvisability of man being alone has special application to the honest man. It is not well for him to be alone, and the kind of publicity which makes him feel lonesome in his honesty is not likely to have a very bracing effect on the honesty itself.

It has got so with us that, in affairs of state, the surest way to public notice open to an ambitious politician is to be either a corruptionist or a blunderer. For, through these exaggerations of the importance of publicity for all the apparently destructive elements in social or political life, we have come to a point where they are the ones most exploited. This attitude is hostile to progress, because mere opposition is never progress. It is as true in the world of affairs as in that of sport, that a community whose energies are devoted to playing a merely defensive game seldom wins any substantial victory. This is the main lesson to be drawn from the general history of

reform movements in American municipalities. These movements, until very recent years, have originated almost uniformly in the moral delinquencies of the political organization entrenched in office, which have aroused the conscience of the best citizens to revolt. It has been mere revolt. The results of these movements rarely have been permanent, because their progress usually seems to stop after putting the rascals out. The ranks of reform are filled with strenuous house-wreckers, but they contain few builders. The builders are not there, very largely because the community itself seems to offer less encouragement than it should to those who work for it. We have become so accustomed to criticising or denouncing our public men, and to devoting so much of our public print to their mistakes or misdeeds, that silence seems to our exhausted energies a sufficient tribute to the faithful public servant. A friend of the writer's uncon-

sciously expressed this spirit in speaking of a young lawyer who was running for his second term in the State Assembly. "—— made a good record there last term. He did not get a single newspaper roast through the entire session." A success which has to be measured by abuse which has been escaped rather than by recognition gained is a doubtful prize. The quality of our statesmanship will not improve until the time comes when useful work of constructive legislation will entitle a public servant to the same amount of public attention which is now to be received by engineering a railroad or gas grab.

It is accepted as a truism among educators that no child can be made permanently good simply by scolding. The over-scolded child is made worse by the process, and the over-scolded politician is equally likely to deteriorate, and for the same reason. Even a good dog will try to earn a bad name, if he has it thrust

upon him too often. Probably it would be an exaggerated statement to say that the essential spirit of reform in this country is the spirit of the scolding parent, but it resembles it too often.

In New York, for example, many of the most active of the reform organizations of the city have committees which are empowered on their own responsibility and without affirmative action from the general body of their associates to oppose with strong language and peppery protest legislation which they deem it proper to oppose in the name of their respective organizations. They have, however, no power whatever to endorse or support anything without some express permission from the bodies by which they are created, a permission to be obtained, if at all, only after considerable delay and much debating.

The ability to point out with disagreeable clearness social evils and public perils is not alone enough justly to

entitle a man to any great amount of public esteem. Cassandras in breeches or petticoats are of no more real service to-day than in the heroic age; and the miracle about the lady herself was not so much that the Trojans paid no attention to her forebodings and warnings, but that some impatient hero who had work to do did not wring her dismal neck.

There has never been a time when our country has needed to have ideals of service made more fresh and attractive, or when the real work of the world, done by its sane, healthy, and kind-hearted workers, needed greater recognition. It is the good rather than the bad in us which needs encouragement and exposure, and if it once finds work to do, the bad in us will be far less noticeable or troublesome. It is a poor gardener who devotes too much time to the weeds at the expense of the vegetables and flowers.

A story which the present writer heard

some years ago, and which has an obvious point in connection with what he is trying to say here, was told by one of the lobbyists who had been engaged in pushing a "grab" bill through the New York legislature. The bill failed to pass, and the reform organizations and newspapers of New York city, which had denounced it and its sponsors in unmeasured terms, regarded its failure as one of those rare triumphs of aroused public sentiment to which the corrupt legislators had bent and bowed. The lobbyist had a curiously different version of the matter. He said the bill was killed by an obscure parish priest in one of the slum districts of New York, who somehow had got interested in the measure, and had come up to Albany, and apparently with amazing innocence had asked the ringleader of strike legislation, who was one of the active promoters of this particular bill, to use his influence against it. The little priest knew nothing about politics, and

but rarely read the papers; but he had known for a lifetime this particular politician, and knew intimately a side of him not familiar to newspaper readers. He believed in him implicitly, and in absolute good faith asked him to use his influence against the bill, and succeeded. According to the lobbyist, who presumably knew what he was talking about, the little priest had been more powerful in his influence against the legislation which he opposed than all the newspapers and reform bodies in New York together. He was more powerful because he was better armed. He knew the good side of a bad man, and how to appeal to it. For it is as true of any of the rest of us as it was of the spoilsman, that we are willing to do more to justify and keep the good opinion of our friends who are wrong, than to avoid the detraction of our enemies whom we know in our hearts to be right.

VI

THE CITIZEN AND THE JURY

THE CITIZEN AND THE JURY

The first thing the average business man does when the jury notice is served on him is to swear. Then he either looks up his pull, that expressive American name for the underground railroad around the law, or he consults his lawyer. For next to paying his taxes there is no other responsibility of citizenship which seems so galling to him as the very thought of sitting on a jury.

After the affable Irishman who served the hated paper on him has left, he sits with it in his hand and broods over the bitter visitation. He thinks of forty matters he has not thought of before which he now sees that his business absolutely requires him to perform, and which he will be unable to do because he has to serve on a jury. The more he

thinks about it, the worse it becomes, until bankruptcy stares him in the face. Job with his many afflictions never had anything so grievous; by divine mercy he was not compelled in addition to his own woes to pass judgment on the quarrels of Bildad and Elihu. After he has vented his feelings for a few more minutes on his clerk and the stenographer, he can bear it no longer, so he telephones to find out about his pull. If he has no pull, he goes to see his lawyer.

When he puts the jury notice in the lawyer's hands, the look of pleased anticipation fades from the latter's face. Getting an old client off the jury is usually regarded by the client as a favor not requiring a fee, and the lawyer knows it.

"Did n't you get another notice six months or so ago," the lawyer asks in an abstracted tone, "telling you to go down to the Commissioner of Jurors' office to be examined as to your qualifications as a juror?" Yes, the man has a vague

recollection of some notice — had intended to take care of it at the time, but had mislaid and forgotten it. Moreover, he had not paid much attention to it, for it was not a regular jury notice anyway, as it did not say anything about going to court.

"Well," says the learned one, "perhaps it is n't too late yet. We will look and see if you are on the exempt list." He takes down a big book and finds the list of persons whom the law, which falsely claims to have no favorites, exempts from jury duty, and together they scan it for a means of escape. It is a fairly long list. To the biased mind of the afflicted one, everybody appears to be on it but the plain business man.

First comes the clergy, "ministers of any religion officiating as such and not following any other profession." Now through just what special claims the clergy is exempt from jury duty is not very plain. It appears to the business

man's prejudiced mind that the men who make a life work of talking about divine justice and the golden rule should seize upon jury work as a great opportunity for service well within their calling, instead of being the Abou Ben Adhems of the exempt. But his lawyer, with a touch of professional cynicism, assures him that it is easier to expound from the pulpit theoretical or ideal justice than to bring in a fair verdict in a dog case, and adds that there is no demand in the law courts for jurors with lawn ties and reversed collars.

Following the ministers in the exempt classes come the other professions — the lawyers, the doctors, the teachers, editors, officers of railroads and vessels, national guardsmen, honorably discharged firemen, and then there is hope, — "persons physically incapable of performing jury duty by reason of severe sickness, deafness or other physical disorder." "Well," the man tells his lawyer with a sigh of

relief, "I 've got a doctor who has attended my family for fourteen years. If he does n't fix up a certificate that will get me out of this jury business after all the money I 've paid him — well, something will drop. My hearing has never been quite the same since I had a boil in my ear seven years ago."

The lawyer looks at him skeptically. "You should have tried that on the Commissioner when you got the first notice to come down to see him," he says at length. "Still, if you are physically incapable of serving, and your doctor makes up a good, stiff certificate, perhaps the judge will let you off this time. You 'll get called again, though, pretty soon, and have to go through the same business, unless you get the Commissioner to mark you off his list."

With this small crumb of comfort, the business man goes up-town. He understands now why Wilkins, his corpulent competitor in the knit goods line,

was for five years the local jest of his suburban town, because of his membership on the volunteer fire department, and why Taylor, the lace importer, is in the National Guard. They were exempt, or soon would be, when the term of service which the law requires for exemption had expired. For himself, poor man, not being a member of either of these jury clubs, there is nothing but the temporary relief to be afforded by the accommodating conscience of the family doctor.

Now, as a matter of fact, if the dodger had further inquired, there are plenty of other good excuses, suggested as well as sanctioned by the law. The death or dangerous sickness of the juror's wife or of a near relative, or even of a near relative of his wife, will do. With a green or credulous judge, a well-told story that the juror's "business will be materially injured by his attendance" may be successful. But the business man

has an almost superstitious faith in the doctor's certificate. By common tradition it is a precious amulet, a potent charm against jury business and all its attendant troubles.

The hearing of the manifold excuses by which a large percentage of "drawn" jurors try to avoid serving is part of the regular work of a trial judge on the opening day of the court term, and long experience makes the average judge exceedingly suspicious of all kinds of juror's excuses, particularly of physicians' certificates. For to such bad eminence has the profession attained by yielding to the pressure of "old patients" suffering from incipient jury duty, that a special statute has been enacted in New York, making it a misdemeanor for a physician to give a false certificate "for the purpose of enabling a person to be discharged, or excused, or exempted as a trial juror." The judge rarely takes a doctor's certificate for quite its face value,

and looks for further evidence of the juror's disability.

Some years ago, a juror came before a Supreme Court judge in Brooklyn with a certificate that he was incapacitated for jury duty by deafness. The certificate was couched in the most technical of medical phraseology, and the judge gravely read it through while the afflicted juror stood by, his hand behind his ear, in an attitude of pained attention. Finally the judge looked up and said softly: "I 'm sorry for you, sir, you can go" . . .

"Thank you," said the delighted juror, starting to leave the platform.

"Back and sit down," roared His Honor, "where you will be in readiness to act as a trial juror in this court. This certificate is a lie."

Another doctor's certificate story has as its subject a somewhat miserly East Side Jew, the owner of many tenements in the neighborhood of Delancey Street. Being of a saving nature and having no

family physician, he had gone to Gouverneur Hospital and obtained from a young ambulance surgeon a certificate which he presented with much confidence to the judge. His Honor read it, put on his glasses, read it again, and a quiet smile came over his face. "Mr. Kominsky," said he, holding up the paper, "do you know what this says?" The latter shook his head mournfully. "Listen, then, and see if you understand it. 'This is to certify that I have carefully examined Ahab Kominsky, and find his cerebral contents such that he is unfit to serve as a trial juror. J. P. Ryan, M.D.'"

While the clerk pounded for order, the Court continued dryly, — glancing at the amused faces of the other jurors, — "Mr. Kominsky, I am very sorry, but this is not a legal excuse. If it were, the Court would often be without sufficient jurors for its work. You must serve." A few moments later, when an interpreter translated into Yiddish the mys-

terious words "cerebral contents" to the unfortunate Kominsky, his distress was pitiable. "Mein Gott!" he moaned, "that I should give that young doctor mans two dollars for such a paper."

Another story of a somewhat similar nature is told of an East Broadway merchant of the same race, named Hyman Pelkin. Having been drawn for jury service in the Supreme Court in New York city, he went down-town to the court house the day before that on which he was summoned to appear, to see if he might learn of a way of escape. In one of the parts of the Supreme Court there is a middle-aged Irish clerk known to a host of lawyers as "Mac," the rest of his name being shrouded in obscurity, a fine compound of kind-heartedness, irascibility, and a vast amount of knowledge of that branch of the law known as "practice," a fund constantly drawn upon by lawyers and by lawyers' clerks, who want accurate information about

such matters without having to look them up.

Hyman Pelkin followed the procession of inquirers and came to "Mac," who listened sympathetically to his trouble. The Irish oracle bethought him that the law requires a trial juror to be worth two hundred and fifty dollars. "Hyman," said he, looking at his questioner's somewhat shiny garments, "are you worth two hundred and fifty dollars?" Hyman did not fancy the question, but he grudgingly admitted that he was worth that amount, adding irrelevantly that he "vas a poor man, and could not pay that much."

"You never were a soldier — you never got discharged as a fireman, did you?" continued his questioner facetiously. He was amazed by the answer.

"What, 'a fireman,' you don't say. Why, you 're all right, Hyman, my boy. You get your certificate showing you got honorably discharged and hand it to

the judge. He 'll let you off all right. Get along, now, and don't bother me any more."

The following day, in the list of jurors with excuses appeared Hyman Pelkin, with a document in his hands which he had obtained at some labor and by an expense of fifty cents. The judge opened and read it. The paper was a certificate under the great seal of the Court of General Sessions, which set forth that a jury duly impanelled in that court in the case of the People against Pelkin had acquitted the said Hyman Pelkin from the charge of arson in the second degree, and that the court thereupon had ordered the prisoner discharged.

"What does this thing mean?"— began the puzzled judge.

"Your Honor," Hyman broke in eagerly, "I vas a fireman and I got discharged." He was excused.

But there is a serious as well as a comic side to jury dodging. The extent

of its practice by business men is such as may be fairly called alarming. Take New York city, for example. When men who are summoned to appear at court to serve on juries fail to respond to that summons, a fine is usually imposed of from fifty to two hundred dollars. During the last jury year (1904–5), the records of the Commissioner of Jurors show that in old New York city (not including Brooklyn) there were such fines imposed against some fifteen hundred individuals, amounting to over one hundred and fifty thousand dollars! In the Supreme Court alone in that city the seven hundred fines thus imposed in that year amounted to sixty-six thousand two hundred and seventy-five dollars.

These fines, it should be remembered, are for the most part imposed only against the men who, having no plausible excuse of any kind, simply ignore the jury notice entirely. These figures take no account of the infinitely larger

army of jury dodgers who make up excuses, present them, and get out of jury service without any such penalty being imposed upon them. During the same period, in New York city thirty-three thousand five hundred men were required to appear in the courts for service as jurors — and of this number only thirteen thousand six hundred and sixty-nine actually served — nearly twenty thousand, or sixty per cent, dodged the jury box. Statistics of other large American cities would undoubtedly show similar percentages.

As business grows more complex, the jury system year by year is being put to severer tests, and its efficacy in the purposes of justice is being daily questioned by iconoclasts who would destroy it. For the commercial methods current in our time are not so simple as they were centuries ago, and when they are involved in disputes between merchants, a higher order of intelligence is required in the jury

box. The property interests which must be settled by jury trials are infinitely greater than ever before. If the jury system is not to break down and be discarded, as it practically has been in England, this demand for intelligent men on our juries must be met. It will not be met, if business men who have been trained to understand such matters shirk and evade that work.

Once in a while the jury dodger, the man who is unwilling to devote any of his own time to settling disputes between his neighbors in the law courts, finds himself in need of an honest and intelligent jury to pass on the merits of a lawsuit of his own. The writer is able to record at least one such case. The jury dodger in question was a large clothier, and had been accustomed to elude jury service by the annual donation of an overcoat where it would do the most good, and he made no secret of this scheme by which for perhaps a dozen years he had avoided

being "drawn." He was, however, a large real estate owner, and one day an old Irish woman fell downstairs in one of his tenement houses and promptly brought suit against him for a fabulous sum which she demanded for her injuries. When the case came to trial, it happened that the list of jurors from which his twelve men in the box had to be selected was precisely what he deserved. The jury system in his case was just what he and other jury dodgers of his class had tried to make it. A stupider or more irresponsible looking dozen of men would be hard to get together anywhere. Only one of them evidenced outwardly even the remotest sign of prosperity, and he turned out to be a Tenth Avenue saloon-keeper. When the case was tried, the weight of evidence was entirely against the old woman, for she had but herself for a witness in her own behalf, against four or five witnesses called by her jury-dodging adversary. But the jury, after listening apatheti-

cally to the eloquence of the defendant's lawyer, promptly brought in a verdict of nearly four thousand dollars against him. It is to be hoped that the old lady got her money, for so far as the defendant was concerned, the community had furnished him with just the jury to which he fairly was entitled.

The man who is too selfish to devote any of his own precious time to the performance of one of the few direct personal duties which in our country the State demands, surely has no right to expect that, when he wants a jury for his own case, he will find other business men any more ready than himself to drop their work and spend their equally valuable time in examining his lawsuit and getting justice done for him. So far as he is concerned, they have an equal right to be "busy."

It is a curious, but very significant fact, that the persons who are most severe in condemning the defects of the jury

system are usually those who know least about it. The business men who are most afraid of courts and lawsuits, who are most easily blackmailed by "strike" lawsuits into paying unjust claims made against them, and who abandon just claims of their own, in the vast majority of cases are men who have had no actual contact with the jury service themselves. The best friends of the jury system, on the other hand, are men who have served on juries themselves, and who, from personal acquaintance with it, know to what extent the plain, ordinary, every-day citizen can be counted on to do what is right in settling the disputes of litigants. There are, however, many high class business men who make a principle of serving on juries when they are called upon to do so, and who do it freely, without grumbling, and without making any particular virtue of it. It is rarely indeed that one of these men speaks pessimistically or despairingly of the jury system itself.

Sitting on the jury ought to be considered very well worth while as a part of a business man's education. Every man in the business world is practically certain some time in his life to have a lawsuit of the kind which a jury will have to settle. It would seem a matter of common sense for him to know something at first hand about the workings of the system by which his own case will have to be decided.

If he serves once, even if he grumbles and tries to dodge, the chances are good that he will go more willingly the next time. For the public task which jury service imposes is really neither onerous nor unreasonable. On the contrary, there are many incidents and much variety. Many an acquaintance made among jurors has, moreover, proved of advantage afterwards. There is always much to be learned there, including law, business, and, above all, human nature.

Moreover,—a point which the learned

writers on the jury system usually have overlooked or ignored, — the justice which it is good for the litigant to receive is good for the juror to give.

The greater part of the ordinary business man's working life is a struggle, largely a selfish struggle, in a highly competitive commercial world, to get the better of his business adversaries. This has a tendency to make him see things from one side, and that his own; to make him consider his interests as paramount, to cause him to overlook, or to regard with indifference what, but for the stress of competition, he might consider the rights of others. The jury system breaks into his business, and, by taking him away from it, puts him in a position where, for a considerable period of time, he must cease to consider his personal advantage or the detriment of his competitors, and must devote his whole mind and conscience to the high and very difficult task of doing justice.

The jury system is one of the most democratic of our institutions. The man of wealth and education finds himself seated in the same jury box with men whose advantages have been fewer, and whose possessions are less. After they have risen together, and in the simple words of the juror's oath have sworn "well and truly to try the issues joined between plaintiff and defendant, and a true verdict render according to the evidence," each in his turn learns that the love of justice does not belong solely to any one class, but is common to all, and that when the bias of personal interest has been removed,—and jury service is usually free from such influences, — the vast majority of men believe in fair play, and will do their best to help it along.

VII

SOME EQUIVOCAL RIGHTS OF LABOR

SOME EQUIVOCAL RIGHTS OF LABOR

The American workingman is a pretty good citizen on the whole, and except on rare occasions is law-abiding enough to suit any but the over-fastidious devotee of law and order. Even the best of us — from the trust magnates down — find at times some law or decision which we try to steer around in some peaceable way, and the real difference between the rest of us and the workingman in his occasional ebullitions against government by injunction is a matter of manners rather than morals. It is a difference of method rather than purpose. While we adjust our course to avoid, by a safer and more circuitous route, the big rock of statutory prohibition to get at what we want in the forbidden waters beyond, the working-

man sometimes tries to push over the rock itself, and comes to grief in so doing. This is what constitutes in the public mind the greater part of the so-called "lawlessness of labor."

To the large public of the well-fed who live by their wits and not by the direct application of physical labor, the grumbling of the laborer against the law seems delightfully simple. To this public the whole grievance of labor, spelled with a capital, is that the law forbids the heaving of bricks at scabs. This legal prohibition seems to us the most comfortable of doctrines. The law of brick-throwing has had so much discussion, and so many able efforts have been made, not only by the judges, but by distinguished writers and public men, to show the laborer wherein he is wrong in so doing, that any extended discussion here of that subject would be superfluous. What the writer hopes to do is to cover some matters which far more vitally affect the laborer's

attitude toward the law and the courts, and which, more than the "government by injunction" fetich, constitute those industrial problems of labor which must find some time an ultimate solution in law. They are matters of which the general public has little knowledge, and which, if better known, would insure perhaps a more sympathetic attitude toward the workingman's point of view.

Stated as concretely as possible, the principal difference between the working-people and the courts lies in the marked tendency of the courts to guarantee to the workman an academic and theoretic liberty which he does not want, by denying him industrial rights to which he thinks he is ethically entitled. His grievance is that in a multitude of instances the courts give what seems to him counterfeit liberty in the place of its reality.

A few illustrations of this will make the meaning clear. Some years ago, in Buffalo, N. Y., a girl about eighteen

years old, named Knisley, was employed in the factory of one Pratt. She was at work on very dangerous machinery, which had no safety-guards to protect her from injury, in spite of a statute of the State requiring such machinery to be guarded. The girl had her hand caught in the revolving wheels, and it was so crushed and torn that the arm had to be cut off at the shoulder. This statute which required safety-guards on this machinery had been passed at the urgent insistence of New York labor unions, so that working men and women, by such additional precautions enjoined upon their employers, should have safer places in which to do their work. This employer, Pratt, had violated this humane statute, and by that violation the young girl lost her arm. She sued Pratt for damages, and got a verdict from a jury in her favor. The highest court of New York took away that verdict and dismissed her case. The court said that the girl fully understood

the danger to which her employer's violation of law had exposed her. She had the "right," it declared, to assume the risk of injury and keep at work at this machine, notwithstanding the danger to which she was exposed. The judges said that because she kept at work, knowing the danger, she was presumed to have agreed with her employer to waive any claim of damages from him in case she was hurt. She had a right to do this, notwithstanding the requirements of the statute which ordered him to protect her safety. Instead of giving this girl the actual and substantial right which the statute provided for her, — instead of declaring that she had a right to work in safety, — they gave her an academic right, the right to work in danger, to accept danger and suffer by it without redress.

In a State in which, every year, there are more than twice as many persons killed in industrial establishments as were

killed in the Spanish war; in which, in addition to the killed, forty thousand employees are annually crippled, maimed, or wounded, such a decision, guaranteeing to working men and women the right to endure unnecessary danger, and effectually denying their right to safety in their work, is bound to create some dissatisfaction among the working-classes. Labor's right to get killed, guaranteed by decisions of which this New York case is but a characteristic example, is not highly esteemed by the people to whom this guarantee is given. The counterfeit liberty is no more satisfactory to its recipient than is the counterfeit dollar.

The workingman's standpoint is perhaps more likely to receive sympathy when his safety is not merely a matter of his own concern, but involves the safety of the public as well. A very recent Texas case of this kind affords a good illustration of the difference in the eyes

of the law between the locomotive engineer's right to safety and that of the public traveling on his train. This case, though tried in Texas, involved the construction and application of a statute of Arizona enacted to prevent railroads from overworking their employees; to protect not only the railway employees from physical exhaustion, but the public from accidents occasioned by that exhaustion. This statute prohibits the employment of a certain class of railway employees, including locomotive engineers, for more than sixteen consecutive hours, without an allowance of nine hours for rest. It is a statute remarkable not so much for what it prohibits as for what it permits. In 1903, a locomotive engineer on the Atchison, Topeka, and Santa Fé, named Smith, after working in Arizona for seventeen consecutive hours, started for his home to rest and sleep. He was sent for immediately by the master mechanic, and, against his protest that he needed

rest, was set at work again, the master mechanic assuring him that the run would not take more than five or six hours at the most. But the run lasted fourteen hours more, and after thirty-one hours of continuous service, unavoidable drowsiness came over the engineer. He slept in his cab with his train on the main line of the railroad. There was a collision near El Paso, Texas, with another train, by which he and others were hurt. The highest court in Texas says that the injuries of the engineer were his own fault, and that, while the railroad was liable to passengers, it was not responsible to the engineer. It says that the violation by the railroad of this reasonable statute, in overworking the engineer beyond human endurance, "would not excuse the contributory negligence of Smith" (the engineer), "which arose from his working for such a length of time that he was unfitted for business. He knew his physical condition far better than the railroad

company could know it, and cannot excuse his carelessness in falling asleep on his engine while it was standing on the track, by the fact that he was required by the master mechanic to take out a train after he had been at work for seventeen hours."

The logic of this decision, like that of hundreds of others of similar character, is absurdly simple, and to the workman absurdly unjust. The reasoning of the court is that this man could have refused to work if he was tired, and could have taken his chances of an almost certain discharge from employment. The decision is simply one of a thousand judgments which declare to the workman what is to him a worthless and academic liberty, — a liberty which exists without law or the declaration of courts, — the right to lose his job. It scarcely needed a legal decision to tell this engineer that he could throw up his job if he did not want to work thirty-one hours on a

stretch. The law the workman wanted was a law which would place reasonable limitation on the duration of his labor *without costing him his position.* If to lose his job was the only way he could derive benefit from this statute, which forbade his road to overwork him, then the statute was and is of as much practical use to him and his fellows as Pat's insurance: "It 's foine, but I have to be dead to get it."

The enormously increasing number of railroad accidents in this country, compared with other countries, has attracted much attention. The greater number of deaths thus occasioned are of railway employees, but there are enough passengers killed every year to make the legal status of the railway employee, as regards his right to safety while at work, important to the public, as well as to him and his fellows. The safety of the railroad employee is too closely bound to that of the passenger to be separated in the

eyes of the law. When the collision comes, the engineer may die first, but the passengers are there in the cars right behind him.

These two illustrations might be multiplied, but further examples would add little. The workman does not want the vain liberty so often declared to him by the courts, of throwing up his job and looking for another. He does not take kindly to the judicial affirmations to him of the right to be maimed without redress, or to be killed, by his employer's indifference to his safety. His grievance is not directly with the courts and law. The workman knows little about the law, and most of what he understands he does not like. He objects to the economics on which these killing decrees are rendered against him. He does not call it economics, but at the bottom the real trouble from the workman's point of view is the blindness of courts, which do not seem to notice or to understand

the social and economic conditions under which he has to work. For the law still embodies in these decisions an outworn philosophy, the old *laissez-faire* theory of extreme individualism. This theory resolutely closed its eyes to all common, obvious, social and economic distinctions between men, considered either as individuals or as classes, and with self-imposed blindness imagined rather than saw the servant and his master acting upon a plane of absolute and ideal equality in all matters touching their contractual relation; both were free and equal, and the proper function of government was to let them alone. If the servant was dissatisfied with the conditions of his employment; if the dangers created, not merely by the necessities of the work, but by the master's indifference to the safety of his men, were in the eyes of the latter too great to be endured with prudence, then, being under this theory a "free agent" to

go or stay, if he chose to stay, he must take the possible consequences of personal injury or death.

To the workingman of to-day this theory embodies the liberty of barbarism, — the "freedom" of the Stone Age. This freedom is to him not liberty, but injustice.

The history of the modern trade-union movement is comprised for the most part in the workman's struggle for three morally sound economic rights, — the right to fair pay, the right to fair hours, the right to decent conditions under which to perform his work. No inconsiderable amount of violence, and sometimes bloodshed, occasioned by the struggles for these rights, has been due to the fact that the law has not recognized them as legal rights, but as a substitute for them has "guaranteed" the worker their precise opposites as ironic forms of personal liberty.

There is small comfort for the workers

who have secured by strenuous efforts the passage of a law reducing the number of hours of their labor, by forbidding their employers to require more, to be told by the courts that the constitution "guarantees" them the right to work fourteen hours when they want to work eight, and that the statute which they had secured by so much effort is unconstitutional because it interferes with their "freedom of contract." The right the laborer sought by his statute was the right to leisure. The right the court so often guarantees him in its stead, and by its destruction, is the right to work unlimited hours under the stern laws of necessity. The right to work harder and longer than he desires, or than humanity should require, is called by the courts a property right, and the statute taking away that right is one, they declare, which takes away property "without due process of law." "Oh, wretched man that I am," says St. Paul, "who shall deliver me

from the body of this death?" The laborer with his constitutional body of death groans also, and wonders if the time will ever come when the right to leisure — the right to reasonable freedom from toil — will become a "property right," and be recognized by the law, as it is by the workman himself, as an essential part of that constitutional "life, liberty, or property," of which he is not to be deprived.

The guaranteed right to work with an over-sweated brow for his bread is not accepted by the workman as a great judicial ark of liberty. To get rid of this liberty he organizes in increasing numbers, and strikes and lockouts follow, so that industry shall recognize and give to him the liberty which the law has refused. He says if the law will not give him the right to reasonable leisure, he will take it for himself. When the United States Supreme Court, a few months ago, declared the bakeshop Eight Hour Law

unconstitutional, and guaranteed to bakers sweltering at underground ovens in New York the right to work fourteen hours a day, under the frightful conditions in which their work has to be done, strikes of bakers followed. Such strikes seem to follow such decisions.

One of the rights, economic and moral, perhaps, but not yet legal, for which workmen have been struggling for a quarter of a century, is for decent conditions under which to do their work. Some progress has been made in certain directions, but the main work is yet undone. How indifferent their success has been in gaining legal support for the safety of their labor has been indicated in an earlier part of this paper. The danger of accidents, however, usually can be avoided, by constant vigilance. But the danger to health, life, and character, from having to work in the unsanitary hovel, the badly lighted, unventilated, and unclean tenement; the destruction

of the home by those remorseless laws of industry which seem to compel the helpless worker in the sweated trades to turn his home into a factory, are incalculable. A law which guarantees to the worker a right to destroy his own home is as valuable to him as one which should guarantee his right to commit suicide. The law, however, forbids the quick process of self-inflicted death.

There is among the yellow volumes of the New York Court of Appeals Reports a decision rendered twenty years ago, which means to the worker in the tenements, in the sweated trades, precisely what the Dred Scott decision meant to the slave, — a guarantee of bondage. On its face it is a guarantee of liberty. Read by any business man or broker, by a reader unfamiliar with the tenement problem, by any banker sensitive to property rights, it is a splendid judicial utterance in the defense of fundamental individual rights. By such readers, this

famous decision cannot be read without feeling what Rufus Choate would call "a thrill of sublimity."

Read by the tenement worker or sweated toiler in the needle trades, this same decision is like a voice which sentences him to penal servitude for life. The case referred to is the famous Tenement House Cigar case, *In Re* Jacobs. It declares unconstitutional a sweeping, badly drawn statute, enacted through the efforts of a cigar-makers' union, which prohibited the manufacture of cigars and the preparation of tobacco in any form in tenement houses. The cigar-makers knew what the conditions were in which they had to work in their own homes. The statute which they had drawn was, from their point of view, for the protection of the tenement worker's home; was to be the entering wedge for further enactments of the same character. Sweeping and broad as were the provisions of the statute, the decision of the court

against its constitutionality was equally sweeping.

One of the most intelligent students of our social problems, a woman whose life has been chiefly spent in studying and bettering the condition of the poor, and who is thoroughly familiar with the conditions of which she writes, says in a recent book of this Jacobs case: "To the decision of the Court of Appeals in the case *In Re* Jacobs, is directly due the continuance and growth of tenement manufacture and of the sweating system in the United States, and its present prevalence in New York. Among the consequences and the accompaniments of that system are congestion of the population in the tenement districts, the ruin of home life in the dwellings used as workrooms, child labor in the homes, endemic diseases (especially tuberculosis) due to the overcrowding and poverty of skilled workers, the chronic pauperism of thousands of skilled working-people during a part

of the year in a series of important trades, insanity due to overwork followed by anxiety over a prolonged period of unemployment, and suicide — the self-inflicted death of a garment-worker being of almost daily occurrence in New York and Chicago."[1] These harsh and bitter words are — let us remember — written of a decision which guarantees to the worker the right to work in his own home!

Other illustrations to show the reason for the attitude of the workman toward the courts might be given, but are not needed. They would simply afford further data to emphasize the same point, — the apparent fundamental difference between the worker and the judge on the very definition of liberty. It need not be claimed that the worker's point of view is absolutely correct; it need not be asserted that the things he has asked

[1] Florence Kelley, in *Some Ethical Gains through Legislation.*

from the courts and has been refused have all been such as in the long run would be best for him. The whole point to be noticed is simply this: that by the working-class ideal of liberty a special demand is made on the law, — a demand more frequently refused than granted. What it demands from the courts is the recognition and protection, and at times the creation, by law of the worker's economic rights. The law, on the other hand, guarantees to him the ancient and largely negative individual liberty, freedom from legal restraints, the right to do any unforbidden thing he wants to, — if he can, — and tells him to shift for himself for his economic rights. The worker's discontent with the law lies in the fact that it guarantees him individual, and not social or industrial, freedom.

VIII

CRIMINAL LAW REFORM

CRIMINAL LAW REFORM

Down in the Cherokee nation they tell a story. The Cherokee nation is in the division of territory which is known to the Federal authorities as the Western District of Arkansas, and which includes the Indian Territory. It is a fairly lawless country, with a good many bad Indians and outlaws in it. It takes a man to be a law officer there, a brave man, a strong man, and one "quick on the trigger," for it is a dangerous job. Back in the early nineties, a deputy marshal and an Indian were sent in the name of the law after an escaped convict, and they went out into the bad lands after him. About nightfall they came to a house, where they stopped and went to bed. At midnight two men galloped up to the house. One was a convicted mur-

derer and fugitive from justice, but not the man whom the marshal was after, and the other was a "bad man" named Brown. They shouted until this marshal and his comrade came out, shot them both deliberately in cold blood, killed them, and rode away. The convict was killed later, resisting arrest. Brown, the other man, was caught and brought to trial for murder. My story relates a conversation about this murder trial which is said to have taken place in a law office in the Territory, between another deputy marshal — a friend of the murdered man — and a Cherokee Strip lawyer. The talk took place shortly after the Supreme Court of the United States had for the third time reversed Brown's conviction for murder.

"Jake," said the marshal, "why does n't the court down in Washington let us hang Brown?" "There was an error in the judge's charge," said the lawyer. "Did n't we prove Brown murdered

Tommy Whitehead?" demanded the marshal. "Yes," said the lawyer, "they said on the first appeal years ago that the evidence was strong." "Did they say it was n't cold-blooded murder, premeditation, and all that?" "No," said the lawyer, "they did n't make any point about that." "Then why have they robbed the gallows of that man three times running?" "Well," said the lawyer, "as I told you before, they found there was error in the judge's charge. You would n't understand it. It was reversed on the law, not on the facts. The judge made an error in trying the case." The marshal was silent for a few minutes. "Jake," he said finally, "that error you say I would n't understand was n't the first error in Brown's case. I reckon I understand it now. The first error in Brown's case was partly mine. When Brown was gathered in six years ago, there was some talk about lynching him. I let on that they could n't do it: that

we would stand by the law; that if they tried lynching, we would shoot to kill. That was the first error in Brown's case. I don't know what kind of law they need in Washington. Down here in the Indian Territory they need the kind that has blood and bones to it, — and the next time I won't stand in its way."

This is not a paper on lynch law. But as the existence and increase of the lynching evil affords one of the clearest, if not the greatest, arguments for the reform of our criminal law, this story is repeated here. It is given because it illustrates clearly the two essential conditions by virtue of which lynch law has become the great peculiar American disgrace.

A lynching in its ordinary aspect is not an individual but a community crime. It has two factors. The sensational, the obvious, but not the more essential factor is the brutal animal passion for quick revenge, the lust for blood,

found among many men in whom impulse is stronger than reason. The men controlled by these lawless passions and instincts are comparatively few in number, and negligible in influence. The chief factor in the community spirit by which lynch law is made possible is not the brutal passion of this riotous minority, — it is the attitude of the majority of the community toward the law. They will not hold the rope or fire the fagot, but, like this old marshal of the bad lands, they have lost faith in the criminal law, — they will not stand by it and protect it, — they will not fight for it.

Social wrongs are corrected, not by exposing their results, but by searching for and removing their causes. We have preached against lynch law for a decade, but it increases. The wisest of American statesmen and public men are to-day recognizing the fact that this preaching law and order will not make it, that there is no stopping this fever in our

blood until respect and love for law has taken the place of apathy. Law, to be respected, must be made respectable. To get for it the active support of moral men and women, to make them willing to fight to protect its dignity from outrage, it must have vitality, — must, as the old deputy marshal said, have "blood and bones."

It is because the importance of vitalizing our criminal law is being recognized as one of the pressing reforms which the country needs, that men like President Roosevelt and Secretary Taft are preaching it and urging it on.

We are none of us desirous of destroying the humane and ancient safeguards which in our country are the just protections of the innocent. But as a Southern jurist has aptly said, "We have long since passed the period when it is possible to punish an innocent man. We are now struggling with the problem whether it is any longer possible to punish the

guilty." Law which lacks grip and vitality, which is slow and uncertain, full of technical avenues of escape for the guilty, cannot be respected, for it is not respectable. The support of law-abiding citizens cannot be had for the law of courts which reverse convictions of criminals found guilty on clear and indisputable evidence, for reasons which revolt the rudimentary sense of justice, — which grant new trials to convicted murderers, solely because the trial judge was absent for three minutes from the bench during the trial; because the words "on his oath" were left out of a paper which accused a murderer of crime; because the man who summoned the jury panel to try the murderer had not been sworn in; because on the trial of a murderer the trial judge had failed to put his instructions in writing; because (on the trial in which was convicted a murderer, guilty beyond peradventure) among the seventeen propositions of law with which

the trial judge had charged the jury, one too abstruse for their comprehension had been incorrect; because, among the thousand questions asked in a long, hard-fought trial, "error" had crept into two of them; — which reverse on a quibble the conviction of a murderer who had almost been lynched at the time of his arrest, although "the evidence as a whole warranted conviction;" which reverse the conviction for grand larceny of a notorious thief caught with his booty in his possession, because the proof failed to show whether the money stolen was in cash or bills. All these decisions are taken from the highest courts of States notoriously disgraced by the lynching evil. Further multiplication of illustrations of the same kind might readily be made, but would add nothing but cumulative evidence of conditions crying for change.

In many of these States a criminal trial means two things. It means not only

the sifting of the evidence of guilt or innocence of an accused person, — it means also a rigid, schoolboy examination of the trial judge on the law. If the accused be found guilty on sufficient evidence, but the judge has not passed a perfect examination, there must be a new trial. The counsel for the accused prepares, after long deliberation before the trial, propositions of law, voluminous, intricate, carefully studied, and which have some theoretic or possibly practical application to the case to be tried. When the trial comes, and after the evidence of the witnesses has all been taken and the judge has given his charge to the jury, the lawyer brings out these "propositions" and unfolds them. He says, "I request the court further to instruct the jury as follows." He reads his first proposition. The judge must then decide at once, with little opportunity for deliberation, on the correctness and applicability of this law proposition. He must either add

it to his charge to the jury, or refuse to do so. If he refuses, the prisoner's lawyer says, "I except," and proceeds to his next proposition, and then on through the list. In case his client is found guilty, these propositions which were refused are argued as "errors" on appeal. On the appeal in the higher court, the testimony taken and the proceedings of the trial are printed, and those alleged "errors" argued before judges having the same abundant leisure and opportunity for reflection upon these propositions which the lawyer enjoyed who prepared them, but which the judge who passed on them at the trial did not have. The Appellate Court, examining solemnly each of those propositions (and there are sometimes fifteen or twenty of them in a single case), finds one which should have been charged. It may have been one which, as a matter of fact, the jury would never have understood. But that makes no difference. The guilt of the

convicted man may be clear, but he gets a new trial. He keeps on getting a new trial until the lower court judge can pass a perfect examination on every material proposition of law put before him on the trial, and has correctly decided every squabble between the opposing lawyers over any matter of imaginable substance. Then, the law being satisfied, justice can be done. As the mass of technical rulings and decisions of the higher courts increases, the more difficult it becomes for the lower court judge, who must follow them as precedents, to know them all, to pass his perfect examination, and avoid these legal pitfalls which mean the delay of public justice by interminable new trials.

There is little comfort to be found, moreover, in the fact that the vast majority of criminal cases are disposed of without such appeals. For every technical decision which sacrifices or disregards the substantial rights of a law-abiding

community, and permits the escape or reprieve of some convicted rascal, makes a precedent which affords like comfort to every other rascal who can bring his case within its protection.

In many of these States in which the criminal is more important than the community, the position which the law compels the trial judge to occupy is almost pitiful. He seems shorn of all positive authority, and of all power to direct and control the machinery of justice. He is more like an umpire or referee in the game, — a passive figure, whose sole function is to enforce or apply rules; only there are more rules in the law-game, and the legal umpire's decision, if wrong, is not final, but means that a new game must be played.

Just why, in a country in which the vast majority of judges are elected by popular vote, there should be expressed in law such a superstitious terror lest a judge should give any expression of

his own personality, is puzzling in the extreme. In many States, and particularly in those in which a firm and vigorous administration of justice is of urgent importance, the judge who presides at a criminal trial is not permitted by law to be a judge in any real or vital sense. He must not comment on the evidence, he must not review the facts and set them in coherent order before the jury, he must not sift the testimony and separate the material from the immaterial, he must, above all things, refrain from expressing in any wise a personal opinion on anything, from the start of the trial to its close. He must deal out abstract rules of law, and with such blind guidance, leave the jury to their own devices in endeavoring to apply that law to the facts. If he sees them swayed by misleading eloquence, he must not set them in the path of reason for justice's sake. He is a pilot who must not touch the wheel. The vigorous, commanding fig-

ure of the English judge is by law excluded from the great majority of our criminal courts. For example, the summary of facts in the charge which Justice Bigham gave a few years ago to an English jury in the sensational case of Whittaker Wright, the swindling promoter, would have meant an inevitable reversal and new trial for "error" in any lynch law State in this country.

The critics whom conditions of this kind have aroused are not solely among the laity. The demand for reform comes from an increasing number of law experts, who see in the criminal law itself the great wrong reason for the growth of American lawlessness. "Respect for the constitution is one thing, and respect for substantial fairness of procedure is commendable; but the exaltation of technicalities merely because they are raised on behalf of an accused person is a different and very reprehensible thing. There seems to be a constant neglect of

the pitiful cause of the injured victim and the solid claims of law and order. All the sentiment is thrown to weight the scales for the criminal, — that is, not for the mere accused who may be assumed innocent, but for the man who upon the record plainly appears to be the villain the jury have pronounced him to be."

This balancing the scales for the criminal, which Professor Wigmore deplores in the caustic sentences just quoted, is also appreciated by the criminal classes. A negro arrested for a murder in the Indian Territory told his captor very coolly that "there was a man shot in Oswego, and nothing was done about it." This quotation is from the record of the United States Supreme Court, to which this negro's case had to be appealed three times before his conviction was affirmed, showing that the murderer's confidence in the law was at least in part justified.

The jurist who dissented from each of the reversals of this negro's conviction for murder, who protested vainly against the reversals of the conviction of the Cherokee Strip murderer, by which that murderer finally escaped the gallows, believes in the abolition of the right of appeal in criminal cases. This is the English system. But when Judge Brewer announced this as his remedy for the intolerable condition of our criminal law, some years ago, it found little favor. It did not impress our people as the American remedy for what is an American disease. The right of appeal is an integral part of the American ideal of justice. We look askance at the English system, under which the innocent Becker was twice convicted and punished for two separate crimes, neither of which he committed. We hesitate to adopt in America a system under which such injustice is possible. The right of appeal has legitimate uses. Without that right,

Caleb Powers in Kentucky would have been hanged four years ago.

Our criminal law is essentially American and not English. We must not tear the fabric in removing the spots. We must not in despair seize a desperate remedy.

With all its defects, American criminal law represents in its spirit, as does perhaps no other branch of our law, the great, original American ideal of individual liberty, — the rights of the individual as against the state, — on which our government is founded. When our forefathers first began American government, they adopted the English common law covering civil cases, but they did not adopt to the same extent English criminal law. When we declared our independence and began the work of founding a government of our own, England was operating a criminal law in which the state was everything and the individual nothing, and under which the

liberty of the press was a theory and a name. It was a system under which one hundred and sixty crimes were punishable by death; under which a man on trial for his life on a charge other than treason could not have counsel to address the jury in his behalf, could not testify for himself, or have his witnesses sworn, could not subpœna witnesses for his defense; under which the jury could be punished if they brought in a false verdict against the Crown, but not if that verdict was against the miserable prisoner in the dock. We refused to adopt the barbarous and bloody legal shambles of that criminal law. We reacted against it. We established a system by which the individual was surrounded by mighty bulwarks of legal protection against any possibility of wrong or oppression from the state. We created a criminal law the most humane in the world, but it had and has the defect of its virtues. Instead of a system which over-protected

the state, we erected one which over-protects the individual.

While we did not adopt the barbarous penal statutes of the old country, we did adopt a mass of technical rules of law, which were invented by humane English judges to avoid the necessity of imposing barbarous punishments. We had not adopted the barbarous punishments, and we should not have adopted the humane technicalities which those punishments alone excused or justified. The present trouble in our criminal law lies not only in what we have created, but largely in what we have thus adopted. The humanity which, by those technicalities, made justice in spite of law a century ago in England, makes law in spite of justice in America to-day. The vermiform appendix of old English law must be cut away.

There are two reasons why criminal law reform is a pressing problem to-day. One is the repression by that reform of

lynch law. The other is not less important. We need that reform because the social condition of our day imperatively demands a substantial increase in the scope and power of the criminal law, a system strong enough to meet the new and increasing requirements of our civilization for corrective and repressive criminal law.

A system too complicated to deal out certain justice to common offenders, ignorant and brutal, poor in purse and influence, can never adequately deal with our new class of big business criminals, with the men who get rich by fraud, the corporation inflaters and wreckers, the faithless trustees and grafting directors, the exploiters of municipalities, the magnates who give bribes and the bosses who take them, the trust operators who sin against honesty in business, who break the law against monopolies, who give and take forbidden rebates. How can predatory wealth, powerful, influential,

often intrenched in office, be punished by a system which creaks, groans, and often breaks down, in bringing a border ruffian to justice?

President Roosevelt is not alone in his disgust at his inability to get at what he aptly described on his recent Southern trip as "my own particular scoundrels," the thieves in Federal officialdom. His experience is not an unusual one. It represents the rule rather than the exception. The frightful disclosures of the corruption of the Police Department in New York made by the Lexow investigation are not yet forgotten, nor the almost complete absence of convictions obtained from the criminal courts of those whose blackmail operations filled hundreds of the sickening pages of that committee's testimony. The more recent experience of Mr. Folk is worth noting. He convicted the St. Louis boodlers, Faulkner, Lehman, Schneller, and big "Ed" Butler, the boss of St. Louis, for bribery, and

one of them for perjury. These cases made a sensation all over the country. A great city was being cleaned. The big boodlers were being brought to justice, — civic righteousness was triumphing, the newspapers told us from one end of the land to the other.

Does the country know that all these convictions subsequently were reversed? Does it know that the decision that reversed the conviction of Butler himself ordered his discharge from the custody of the law on so narrow a construction of the statute against bribery on which he was convicted that, if it is followed, bribery is as safe in St. Louis as directing an insurance company in New York?

Space will not permit a discussion of those cases separately. One brief citation must suffice to indicate the spirit in which the highest court of Missouri met its responsibility when men guilty of the highest crimes against the very existence of the State were brought to its bar.

This is from Faulkner's case: —

"This record contains so much uncontradicted evidence of venality that it is little wonder that decent people of all classes are appalled at its extent. The sole consideration of this court has been to determine whether the defendant was convicted *in compliance with the laws of the State.* If guilty the defendant should be punished, but it is the high and solemn duty of this court, from which it shall not shrink, to require and exact that, *however guilty he may be*, he shall be punished only after having been accorded every right and guarantee which the organic law of the State secures to him."

The court then reverses the conviction for bribery of a man clearly found guilty on a record "reeking with venality," for two minor errors in the rules of evidence, and a quibble about a "variance" between the indictment and an instruction!

As I write, the afternoon paper at my elbow contains a notice of the third indictment of Senator Burton of Kansas. The public will remember the charges made against him two years ago as a part of the post-office scandal. He was tried and convicted in 1903 for taking a so-called retainer of $500 a month while Senator, for using his influence with the Post-Office Department in favor of a concern called "The Rialto Grain and Securities Company," which feared that the Post-Office Department would issue a fraud order against it. Burton's conviction was reversed on appeal because of a "variance" between the indictment and the proof as to where he got this money. The indictment said he got it in Washington, and the proof showed that he got it in St. Louis. After this reversal, a new indictment was found against him in St. Louis in March, 1905. Thereupon Burton's lawyer successfully raised technical objections against it, and

it was "quashed." The Grand Jury has now been hastily called together, and a new indictment found, and the newspaper says that if this latest indictment is found defective, Burton will escape trial altogether, as, through the lapse of time, the statute of limitations will prevent a new indictment being found against him.

It is this spirit in the courts which makes for lawlessness among the people, gives confidence to the criminal, encouraging him to continue in his career.

In most American States, the person accused of crime has thrown around him by law not only extraordinary protections against injustice, but also opportunities of escape more numerous than exist in any other jurisprudence in the world. Consider a few of them. When the accused person is arrested, he is brought before a magistrate, who examines his accusers and hears their evidence to see whether there are reasonable

grounds for believing that a crime has been committed and by him. If the magistrate thinks this evidence is insufficient to warrant such a belief, the prisoner goes free. If he thinks it sufficient, the case goes to a grand jury. There again the witnesses are heard, their testimony scrutinized and weighed. If the grand jury finds the evidence insufficient, it refuses to indict, and the prisoner goes free. If it indicts him, the district attorney or prosecuting official next scrutinizes and studies this evidence of the crime charged. If he thinks it is not sufficient to secure a conviction, he recommends that the indictment be dismissed, and the prisoner goes free. If he thinks it sufficient, and the indictment is brought to trial, the lawyer for the accused may induce the court, after hearing the evidence, to dismiss the charge, and the prisoner goes free. If the judge does not dismiss the indictment, or direct the jury to acquit the prisoner, the jury

deliberates on the evidence, and if it finds for the accused, he goes free. If it finds against him, the prisoner has one and sometimes two or three successive appeals which he may take to a higher court.

At what a disadvantage does organized society struggle for justice to obtain the punishment of the guilty! In every criminal law suit, on one side is a living, visible, concrete personality, — the man or woman accused of crime. On the other is nothing but an invisible abstraction, — the ideal of justice. It has no voice; if wronged or outraged, it has no appeal, for under the American system the state, the people, cannot appeal from the verdict of acquittal, and with that verdict the prisoner must go free. When a jury, led away by the eloquence of a gifted lawyer, or by mawkish sentiment, brings in a verdict which acquits a criminal of a clearly proven crime, the ideal of justice, wronged by that verdict, suffers.

But how few are those who see and feel that wrong, in comparison with those who daily plead for unmerited freedom for wrong-doers who have sinned against the law! Against what odds — what great difficulties overcome — does organized society in our country to-day win its victories in our criminal courts! As we study its struggles for vindication by law, the ideal of justice which punishes wrong, which protects by that punishment the rights of the innocent, seems at times not only an abstraction, but a friendless abstraction. When the laws of trade prove themselves weak or inefficient, the commercial world, directly touched and interested, demands and obtains their correction. Its associations plead for statutory amendments to correct and strengthen the commercial code. But among the hundreds of associations organized wholly or in part for the enactment of more efficient laws, where is the association whose special purpose is

to make society stronger to punish the guilty, to vindicate the majesty of justice by criminal law?

It is because such associations do not exist, because this great question of criminal law reform has no active organization behind it and depends for its success on the occasional efforts of associations of lawyers, that a public discussion of the necessity of that reform is needed. It may be said that this subject is a dull one, and that the problems which this reform presents are expert questions for the jurist, the bar associations, and through them the legislatures. To a certain point this is true of course, but there is need that these bodies of experts and the legislatures should feel upon them the pressure of an enlightened popular demand, or this reform so much needed will be slow. It is not a matter for experts alone to observe that of all the great civilized countries of the world, America is the one in which crime in-

creases, while it diminishes in the others. It is not for the law experts alone to note that four times as many murders were committed in our country last year as were committed here twenty years ago, and that other felonies tend to increase in like proportion.

The subject which this essay has considered is in this sense a great public question — one on which an enlightened, earnest, widespread public sentiment cannot be aroused too soon. When that public opinion has been so aroused, and its just demand has been felt, then, and no sooner, will be done the work of adding strength to our criminal law, — of giving it certainty and speed to equal its justice, — then, and not till then, shall we be cleansed of the shame of lynch law, and become a law-abiding people, under a law which protects the innocent and punishes the guilty.

The Riverside Press
Electrotyped and printed by H. O. Houghton & Co.
Cambridge, Mass., U. S. A.

Lightning Source UK Ltd.
Milton Keynes UK
UKHW022005121119
353382UK00005B/1071/P

Published by Palala Press, an imprint of Creative Media Partners.
support.creativemedia.io